HANDBOOK OF PRACTICE

and

INTERNAL PROCEDURES

UNITED STATES COURT OF APPEALS

for the

DISTRICT OF COLUMBIA CIRCUIT

PREFACE

The Handbook of Practice and Internal Procedures of the United States Court of Appeals for the District of Columbia Circuit was first published in 1978. That publication anticipated Section 208(a) of the Federal Courts Improvement Act of 1982, 96 Stat. 54, 28 U.S.C. § 2077, which provides, in pertinent part, "[t]he rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published."

The Handbook was revised in 1987 to reflect major changes in the operations of the D.C. Circuit. These changes included the implementation of the Civil Appeals Management Plan and, in August 1986, a comprehensive new program for managing the court's entire caseload ("1986 Case Management Plan"). The Court also began an appellate mediation program. In 1987 the Court issued a full revision of its General Rules -- the first complete revision of those rules in nearly a decade.

The 1994 edition of the Handbook accompanied the Court's 1993 revision of its Circuit Rules. The rules were revised and renumbered to parallel more closely the Federal Rules of Appellate Procedure. Additionally, while the basic structure of the 1986 Case Management Plan remained, significant modifications were adopted. Finally, the Court completely restructured its Appellate Mediation Program. This new edition of the Handbook accompanies the Court’s incorporation of the 1994, 1995, and 1996 (effective December 1) federal rules changes.

This Handbook is a practitioner's guide to the Court's rules and internal case management procedures. Counsel should bear in mind, however, that the Handbook is for guidance only. *The Federal Rules of Appellate Procedure and the Court's Circuit Rules, as well as any orders issued in a particular case, dictate the specific requirements for litigating a case in the D.C. Circuit, and counsel's first obligation is to consult and comply with those rules.*

The Court will continue to revise the Handbook periodically as necessary to reflect changes in its rules and case processing. The Court also encourages practitioners to forward their suggested revisions to the Clerk or the Court's Advisory Committee on Procedures. In publishing the Handbook, the Court seeks to facilitate the efficient disposition of its cases, while maintaining the high standards of appellate litigation and adjudication that are the tradition of the D.C. Circuit.

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I. INTRODUCTION TO THE COURT

A. PHYSICAL FACILITIES

The United States Court of Appeals for the District of Columbia Circuit is located in the United States Courthouse on Constitution Avenue between Third Street and John Marshall Park, Northwest, Washington, D.C. The mailing address is: United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C. 20001-2866. The principal facilities of the Court are the judges' chambers, the courtroom, the Office of the Circuit Executive, the Office of the Clerk (which includes the Legal Division, formerly the Office of the Chief Staff Counsel), and the Judges' Library. The judges' chambers and the Judges' Library are located on the third and fifth floors of the Courthouse. The Office of the Circuit Executive is located on the fourth floor. The Office of the Clerk and the Legal Division are located on the fifth and third floors, respectively.

The United States District Court for the District of Columbia, the United States Bankruptcy Court, the United States Marshal's Office, and the United States Probation Office also are located in the Courthouse.

The Courthouse became a "smoke-free" building in 1996. Smoking is not permitted in the public areas or in any of the Courthouse offices.

1. *Chambers*

Access to the area of the judges' chambers, the Office of the Circuit Executive and the Legal Division is limited to court personnel and others with legitimate reasons for visiting. All persons visiting these areas must be admitted through the security system on the third, fourth and fifth floors. Visitors should make advance arrangements with the judges' chambers, the Circuit Executive's Office, or the Legal Division.

2. *Office of the Circuit Executive*

The Office of the Circuit Executive is located in Room 4826. Automation staff is in Room 5836. Mediation sessions set up by the Circuit Executive are held in Rooms 5118 and 6429, or in lawyer conference rooms, if needed.

3. *Office of the Clerk*

The public Office of the Clerk is located in Room 5423. This is where the dockets -- the official records of cases before the Court -- are kept, all filings with the Court are made, and orders of the Court are issued. The file room where the public may inspect filings also is located in Room 5423. Both the file room and the public office are open between 9 a.m. and 4 p.m., Monday through Friday, except legal holidays. A filing depository, available 24 hours a day, is located on the first floor. *See infra* Part II.C.2.

4. *Legal Division*

The Legal Division (formerly known as the Office of the Chief Staff Counsel) is located in Room 3429. Conferences convened by the Director of the Legal Division are held in Room 3435.

5. *Library*

The Judges' Library, located on the third and fifth floors of the Courthouse, may be used by court personnel, members of the bar of the Court of Appeals or the District Court, and to any person who is counsel or a party in a case pending in this Circuit, or by the permission of a judge of this Circuit. Any person wishing to use the government document collection will be admitted for that purpose, subject to generally applicable security and other restrictions. Library hours are 8:30 a.m. to 4:30 p.m., Monday through Friday, except legal holidays.

B. PERSONNEL

1. *Judges*

The Court has twelve authorized Circuit Judgeships. By statute, the administrative head of the Court is the Chief Judge, a position filled by the most senior judge under the age of 65 at the time the vacancy occurs. The Chief Judge serves until the age of seventy, or for a period of seven years, whichever occurs first.

In addition to carrying a regular caseload, the Chief Judge is responsible for the administrative business of the Court and the Circuit. The Chief Judge presides in the Courtroom, at the Judicial Council meetings, at the Court's Executive Sessions, and at the Circuit Judicial Conference. The Chief Judge is also a member of the Judicial Conference of the United States.

Supplementing the judges in full-time "active" service on the Court are semi-retired judges ("senior circuit judges"), who handle as full a caseload as they are willing and able to undertake, and, on occasion, "visiting judges" from the district court and from other circuits, as well as retired Supreme Court Justices who, with the approval of the Chief Justice of the United States, are designated to sit on panels in the D.C. Circuit, pursuant to 28 U.S.C. §§ 291(a), 292(a), 292(d), or 294(d).

2. *Judges' Staffs*

Circuit Judges in active service are entitled to three law clerks and two secretaries. The Chief Judge is entitled to three law clerks and three secretaries; four law clerks and two secretaries; or three law clerks, two secretaries, and an administrative assistant. Each senior circuit judge who performs substantial service on the Court may be authorized by the Judicial Council to employ up to three law clerks and two secretaries. No contact relating to court business is permitted between the judges' personal law clerks or secretaries and attorneys

or other persons outside the Court. All communications must be made through the Clerk's Office.

3. *Legal Division*

The Legal Division, formerly the Office of the Chief Staff Counsel, became part of the Office of the Clerk in 1995. The Court's central legal staff consists of the Director, generally one or two Assistants to the Director, and approximately twelve staff attorneys, assisted by approximately three or four secretaries. The office also occasionally employs law student interns. Staff attorneys are hired either on a permanent basis or for two-year terms on a staggered basis. Their primary duties fall into three broad categories: (1) screening and classifying cases and pleadings filed in the Court; (2) making recommendations to panels and preparing proposed dispositions in all contested motions and emergency matters; and (3) making recommendations and preparing proposed dispositions in cases decided without oral argument, pursuant to Circuit Rule 34(j).

In addition to supervising the work of the staff attorneys, the Director and Assistant(s) assist merits panels in managing motions practice, briefing, and oral argument in major cases designated "Complex" under the Court's 1986 Case Management Plan, and in smaller cases deemed appropriate for management. The Legal Division also screens cases for inclusion in the Court's Appellate Mediation Program.

The Director is responsible for the hiring, training, and ultimate supervision of the central legal staff. He or she also works with the Court on major projects related to the Court's overall functioning, including the development and implementation of case processing procedures, and the revision of the Court's Circuit Rules and Handbook of Practice and Internal Procedures.

4. *Circuit Executive*

The Circuit Executive serves both the United States Court of Appeals and the United States District Court. The position was created by federal statute in 1971 at the urging of the Chief Justice to stimulate innovative management in both the appellate and trial courts within each circuit and to provide professional managers in the federal judiciary with both the stature and ability to coordinate court staffs of increasing size and technical competence. While the clerks' offices within the Circuit handle case processing and other "line" responsibilities, the Circuit Executive facilitates these traditional functions by providing a bridge between each of these offices. The Circuit Executive works on projects with other court units and with judges and their personal staffs, and works closely with the Administrative Office, the Federal Judicial Center and Executive Branch agencies.

The Circuit Executive handles other responsibilities as well. He or she creates and implements alternative dispute resolution programs throughout the Circuit; oversees space and facilities projects and food service operations in the Courthouse; plays a key role in implementing automation plans; organizes activities for Circuit managers, including training; is liaison to the Historical Society of the District of Columbia Circuit; and plans and administers the Circuit's Judicial Conference.

The Circuit Executive carries out a wide variety of responsibilities for the Chief Judge of the Court of Appeals, such as preparing the annual budget for the Court; assisting with investitures, portrait unveilings and other official ceremonies; administering the Court's non-appropriated fund; assisting in the resolution of personnel problems; and planning programs for visiting judges and other dignitaries.

As Secretary to the Circuit Judicial Council, the Circuit Executive provides administrative services to the Council. These duties include assisting with the development of new Court-related operations, such as the Federal Defender Organization, and handling problems that

arise in such areas as space and facilities, automation, court and personnel management.

The Circuit Executive's staff includes a Deputy Circuit Executive, three Assistant Circuit Executives, a Director and Deputy Director of the Circuit's ADR Programs, automation specialists, and administrative support staff. The staff is assisted on particular projects by volunteer mediators, as well as by student interns.

5. ***Clerk's Office***

The Clerk's Office is staffed by approximately forty-five (45) persons (which includes the Legal Division's seventeen staff members) and is divided into three main divisions of the office -- the administrative division, the case administration division, and the legal division. *See supra* Part I.B.3. The Clerk's Office maintains the docket of the Court, the official record of all proceedings before the Court, and receives and maintains all filings in the Court, keeping them available for public inspection. It prepares and distributes the judges' sitting schedules and the Court's oral argument calendar, handles attorney admissions to the Court's bar, and it records and distributes all opinions and orders of the Court.

Serving as the Court's liaison with attorneys, litigants, the media, and the general public, the Clerk's Office also provides the Court with statistical, fiscal, personnel, training, and property and procurement services, as well as other administrative support services. The Clerk also is responsible for processing complaints of judicial misconduct or disability, and for servicing the Court's Special Division for the Appointment of Independent Counsel.

6. ***Librarian***

The Judges' Library is administered by the Circuit Librarian and the Deputy Circuit Librarian.

C. COURT ORGANIZATION

1. *Judicial Council*

The Judicial Council of the Circuit, as established by 28 U.S.C. § 332, is composed of the Chief Judge of the Court of Appeals and an equal number of the judges in active service of this Court and of the District Court. The Chief Judge of this Court presides. The Circuit Executive prepares the agenda. The Council holds meetings throughout the year. The meetings are closed.

The Council is empowered under 28 U.S.C. § 332(d)(1) to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." Any member of the Council may place an item on the agenda by forwarding it to the Circuit Executive for inclusion.

2. *Meetings of the Court of Appeals in Executive Session*

Periodically, the judges of the Court of Appeals meet in executive session to discuss the business of the Court. The Chief Judge may also call special meetings to address specific issues. Both active and senior judges attend these meetings and vote on matters of concern to the entire Court. The Chief Judge presides; also generally present are the Circuit Executive and the Clerk. At each meeting the Circuit Executive and the Clerk report to the Court about the Court's caseload and other matters affecting Court operations. Any judge may place an item on the agenda by instructions to the Clerk, who serves as secretary at these meetings. The meetings of the Court in executive session are closed, although on occasion the Chief Judge may request an individual from outside the Court to attend to discuss a matter of concern to the Court.

Six items regularly included on the agenda of the Court's executive session reflect its concern with the status of its work: a report by the Circuit Executive on matters affecting Circuit and Court operations;

a report by the Clerk on the Legal Division's caseload of motions, Rule 34(j) cases, and emergency matters; reports providing monthly caseload statistics such as the number of filings and dispositions; reports by each judge on the status of cases assigned to that judge for opinions; reports on cases that have been argued but not yet assigned for the writing of an opinion; and reports on motions or petitions pending before the judges.

3. *Committees*

The Court uses permanent, as well as *ad hoc*, committees in conducting its internal business. Of particular interest to the bar are the following:

(a) Advisory Committee on Procedures

Circuit Rule 47.4, in accordance with 28 U.S.C. § 2077(b), formally establishes this Committee. The Advisory Committee is composed of not less than 15 local attorneys representing all sectors of the profession -- government, private, public interest, and academic. The Committee initiates recommended rule changes, and it evaluates case processing procedures in effect or under consideration. The Committee also serves as a channel of communication among the Court, the bar, and the public.

(b) Advisory Committee on Admissions and Grievances

Rule II of the Court's Rules of Disciplinary Enforcement establishes this Committee, composed of six members of the Court's bar. The Court may refer to the Committee, for investigation, hearing, and report, any allegation of professional misconduct by any member of the Court's bar. The Committee also advises the Court on its admission policies and practices.

4. *Judicial Conference*

As provided in 28 U.S.C. § 333, the Chief Judge may convene the judges of this Court, the District Court, and the Bankruptcy Court to discuss improvements in the administration of justice within the Circuit. Public officials especially concerned with the work of these courts, deans of law schools in the District of Columbia, and a large representative group of local attorneys from the public and private sectors are also usually invited to participate in the Conference. The Circuit will occasionally convene, however, a Conference including only judges and court staff. Further information on the Conference is contained in Circuit Rule 47.3.

D. THE CIRCUIT RULES

Federal Rule of Appellate Procedure 47 permits each court of appeals to make local rules not inconsistent with the Federal Rules of Appellate Procedure. To become effective, local rules must be approved by a majority of the judges in active service. In this Circuit the local rules are called the Circuit Rules (cited as "D.C. Cir. Rule __").

Circuit Rule 47 provides for notice and an opportunity to comment on proposed changes to the Court's local rules. Proposed rule changes are posted in the Court's public office, sent to all subscribers to the Court's slip opinions, and published in *The Daily Washington Law Reporter*. They also are sent to the presidents of the

District of Columbia Bar, the Bar Association of the District of Columbia, the Washington Bar Association, the Women's Bar Association, and the presidents of any other organization described in Circuit Rule 47(c)(4)(E), who notify the Clerk of the Court that they wish to receive notice of proposed rule changes.

Comments on proposed changes may be submitted in writing to the Advisory Committee on Procedures. The Committee will consider them in formulating its recommendation to the Court and will transmit these comments to the Court, together with its recommendation. The comment period will ordinarily be no less than 45 days.

Circuit Rule 47(b) also provides that any person may propose a change in the rules by submitting a written request directly to the Court or to the Advisory Committee on Procedures.

II. PRELIMINARY MATTERS

A. ADMISSION TO PRACTICE

(*See* Fed. R. App. P. 46; D.C. Cir. Rule 46.)

1. *When Required*

An attorney practicing before the Court must be a member of the bar of the Court, except as otherwise provided by law. Membership in the bar of another court does not confer membership in the bar of this Court. The Clerk's Office will not file briefs, motions, or other papers not signed by a member of this Court's bar. The pleading will, however, be lodged with the Court and filed once the attorney becomes a member of the bar of this Court.

There are three qualifications to this rule. First, in order to file a notice of appeal in the district court or a petition for review, an attorney need not be a member of the bar of this Court. Any further filing in the appeal, however, must be signed by a member of the bar of this Court. Second, the requirement is temporarily suspended

whenever a problem of timeliness might arise. Where this is the case, the Clerk will file the pleading and immediately notify counsel of the admission requirement. Third, law students under the direction of a supervising attorney may practice, as provided in Circuit Rule 46(g).

An attorney who is not a member of the Court's bar may be granted leave by the Court to present oral argument in a case. Counsel of record should advise the Clerk's Office at least seven days in advance, at the time counsel submits Form 72, *Notification To The Court From Attorney Intending To Present Argument*, that a motion for leave to argue *pro hac vice* will be made. Permission is usually granted by the Court on the morning of oral argument. However, were the Court to deny the motion, counsel would be informed in advance of the argument date. The attorney who wishes to argue *pro hac vice* should arrive at the courtroom, accompanied by a sponsoring attorney who is a member of the bar of this Court, at least 20 minutes prior to the start of argument for the day. They should then immediately notify the courtroom deputy clerk, who will furnish appropriate forms and advise counsel of the procedures for admission *pro hac vice*. Counsel who litigate regularly before the Court should *not* make repeated appearances *pro hac vice*, but should apply for admission to the bar of the Court. Similarly, counsel should not seek to appear *pro hac vice* in order to file pleadings; rather counsel should apply for admission to the bar of the Court. Counsel who are not members of the bar of the Court or who have not been granted leave to appear *pro hac vice* will not appear on the opinion heading.

2. *Obtaining Admission*

The Court admits to practice before it attorneys who have previously been admitted to the bar of the highest court of a state or to the bar of other federal courts. Applicants must fill out the forms supplied by the Clerk and submit them with certification of their membership and good standing in the bar that qualifies them for admission. They must also remit the fee specified by order of the Court. Attorneys then are admitted on the written application without a personal appearance. The Clerk will send the attorney a certificate of membership in the bar of the Court.

3. *Exclusion from Practice*

No person employed by the Court, including law clerks, after leaving the employ of the Court, may practice as an attorney in any case that was pending in the Court during the person's term of service. A case is pending in the Court from the moment the appeal or petition for review is docketed until final disposition of the appeal. This prohibition includes signing briefs and giving advice in connection with the case. As a general rule, employees of the Court may not engage in the practice of law. *See* D.C. Cir. Rule 1(c).

Suspension or disbarment by any other court of record may result in the suspension or disbarment of a member of this Court's bar. Before any reciprocal discipline is imposed, the attorney will be afforded an opportunity to show cause why he or she should not be suspended from practice in the Court or disbarred. The Court may refer to its Committee on Admissions and Grievances this or any other suggestion of professional misconduct on the part of a member of the bar.

B. REQUESTS FOR INFORMATION

1. *Procedural Questions*

Personnel in the Clerk's Office and the Legal Division are available to answer procedural questions about matters not covered in the Federal Rules of Appellate Procedure, the Circuit Rules, or this Handbook.

2. *Court Records*

The Clerk's Office will make available, and will assist in locating, all public records in the possession of the Court. Public records consist primarily of information entered in the docket of the Court and any briefs, motions, or other filings not under seal.

3. *Electronic Public Access to Information*

In 1996, the Court implemented ABBS (Appellate Bulletin Board System) and AVIS (Appellate Voice Information System). ABBS is an electronic bulletin board which provides public access to D.C. Circuit opinions, docket sheets, calendar information, and other court records. There is a per minute fee for access to ABBS. To set up an account, interested parties should call the PACER Billing Center at 1-800-676-6856. Access to ABBS can then be obtained by dialing 1-800-426-3231 or, locally, 202-219-9600.

AVIS uses an automated voice response system to read case information directly from the court's database in response to touch-tone telephone inquiries. Callers can receive information such as parties in a case; opening and closing dates; judgments; mandate issue dates; and oral argument dates, times and panels. To access AVIS, dial 1-800-552-8261 or, locally, 202-273-0926. This service is free-of-charge.

In January 1997, the Court created a WEB site on the Internet to provide additional court information to the public. The site is located at: **www.cadc.uscourts.gov**. The site allows on-line viewing and printing of court forms, the Circuit Rules and Handbook, oral argument calendar and other information concerning the Court.

4. *Court Operations During Inclement Weather*

The Court makes its own decision whether to be open in inclement weather. Although the Court of Appeals does not automatically follow the practice of the District Court or the federal government, ordinarily the Chief Judges of the two courts will confer before a determination on whether to close is made. Counsel with filing deadlines or who are scheduled to appear for oral argument must check with the Clerk's Office when there is a possibility that the Court may be closed because of bad weather. Special announcements on closings can be obtained by calling the Clerk's Office general information number.

5. *The Civil Appeals Management Plan; Complex Cases*

Questions concerning multi-party, multi-issue cases handled pursuant to the Civil Appeals Management Plan, or designated "Complex" under the Case Management Plan, should be directed to the Legal Division. Questions that must be answered by reference to the dockets should be resolved by calling one of the Court's electronic public access systems, AVIS or ABBS. *See supra* Part II.B.3. For further assistance, questions can be directed to the Clerk's Office. The Legal Division will, however, advise practitioners whether a case is being managed by the Legal Division, or whether such management would be appropriate.

6. *General Information*

Requests for information of a general nature about cases, such as whether a brief or specific pleading has been filed, or whether the Court has acted on a motion, should be directed to the Clerk's Office or obtained by accessing docket information through ABBS or AVIS. *See supra* Part II.B.3.

7. *Pending Cases*

It is the strict policy of the Court that telephone calls to judges' chambers, or to judges' law clerks or secretaries, concerning the status of any pending case or motion will not be accepted. All such calls will be immediately referred to the Clerk or to the Legal Division.

If the inquiry as to a pending case involves procedural questions or matters of public record, it should be made in accord with the instructions above. If counsel is experiencing a more specialized problem with a case, he or she should call the Clerk, the Chief Deputy Clerk, the Operations Manager of the Clerk's Office, or the Director of the Legal Division. If the problem does not require immediate attention, the Clerk will usually direct that counsel's inquiry be submitted in writing. The Clerk will forward the letter or motion to the Court or Legal Division, as appropriate.

8. *Disclosure of Panels and Dates*

(a) Merits Panels

Ordinarily, the Court discloses merits panels to counsel in the order setting the case for oral argument. In criminal appeals, unlike most civil appeals, the panel will not be disclosed until after the parties have filed briefs. This is because the Court does not make the tentative decision to schedule oral argument in criminal cases until after the appellant's brief has been filed.

In addition, *The Daily Washington Law Reporter* publishes, and the Clerk posts in the Court's public office and on the Court's

electronic bulletin board (ABBS), the calendar for a sitting period approximately one month in advance. The panel is subject to unannounced change when regularly scheduled judges recuse themselves or otherwise become unavailable to sit.

The timing of disclosure of the merits panel when a case is decided without oral argument pursuant to Circuit Rule 34(j) depends on whether the case had been calendared for argument. If originally scheduled for argument, the panel (subject to substitutions) will be the one announced in the order setting the case for argument. If the case has not been calendared for argument, counsel will learn the identity of the panel from the order stating that the case will be decided without argument.

(b) Panels Deciding Motions

It is generally the policy of the Court not to reveal the identity of panels before whom motions are pending until the order disposing of the motion is issued.

(c) Disposition of Matters Under Submission

It is also the policy of the Court ordinarily not to reveal in advance the prospective date of disposition of any matter under submission. This policy applies to the Clerk's Office and to the Legal Division, as well as to chambers personnel. Requests for information of this nature are inappropriate. On the day an opinion designated for publication is issued, the Clerk's Office notifies all counsel by telephone. In addition, the Clerk's Office provides a telephone recording on 202-472-9746 that lists the most recently issued opinions. Opinions also are available on an electronic bulletin board system. *See infra* Part XII.E. In cases decided without a published opinion, counsel will receive a copy of the judgment by certified mail, sent on the day the judgment is entered.

9. *Press Relations*

The Circuit Executive is the designated press officer of the Court. Copies of all orders and opinions entered by the Court are made available to the media in the press box outside the Clerk's Office.

C. FILINGS

1. *Compliance with Rules*

The Clerk's Office examines all items submitted for filing to ensure that they comply with the Federal Rules of Appellate Procedure and the Circuit Rules. All filings must include the name of the attorney making the filing, the firm name, if any, and the attorney's business address and telephone number. The Clerk's Office has the authority to require the correction of any filing that is not in compliance with the Federal Rules of Appellate Procedure or the Circuit Rules.

2. *Timeliness*

(*See* Fed. R. App. P. 25(a), 26; D.C. Cir. Rules 25, 26, 27(h), 28(f).)

In computing times prescribed for filings, the day of the event from which the prescribed period begins to run is not included. Furthermore, if the last day of the period falls on a Saturday, Sunday, or legal holiday, the period is extended to the next business day. All intermediate days are included, except when the period prescribed is less than seven days, in which case Saturdays, Sundays, and legal holidays are not included. Filing of a motion may be by mail addressed to the Clerk but the papers must reach the Clerk's Office within the time prescribed. Only briefs, not motions or other pleadings, are timely if mailed on the date due. However, the Court prefers to receive briefs on the date due. Briefs should be filed according to the schedule set by the Court, not according to when the other side's brief is filed.

Service by mail extends by three days (which includes Saturday, Sunday, and legal holidays) the time for responding to the paper

served (other than briefs, whose due dates are set by schedule). Papers are presumed to be served by mail unless the certificate of service indicates otherwise. In addition, upon motion for compelling reasons, the Court may extend the time prescribed for filing any papers, or allow filings out of time. However, the Court lacks the authority to extend the time for filing papers that commence an appeal, such as a notice of appeal, a petition for review, or a petition filed pursuant to 28 U.S.C. § 1292(b).

Any filing or brief (with the exception of emergency, confidential, or sealed documents) may be left, on the date due, in the Court of Appeals filing depository located at the John Marshall entrance near the U.S. Marshal's desk, unless the Court has ordered that the filing be made at a time certain. The filing depository is available 24 hours a day, seven days a week. All filings must be enclosed in an envelope or otherwise securely wrapped. The maximum dimensions for documents deposited are 14-1/2 inches by 11-1/2 inches by 10 inches. Materials exceeding these dimensions should be split into separate packages and clearly marked. A form provided at the U.S. Marshal's counter must be completed, date/time stamped, and affixed to each package.

Under the Court's Case Management Plan, briefing schedules are usually set after the case has been screened and classified by the Legal Division, and after all outstanding procedural and dispositive motions have been resolved. In cases classified as "Regular Merits" cases, the oral argument date and the briefing schedule are usually set in the same order, and the briefing schedule is computed *back* from the oral argument date. In cases classified as potential "Rule 34(j)" cases, the briefing schedule is set in the order notifying counsel that the case may be disposed of without oral argument under Circuit Rule 34(j). Finally, in cases classified as "Complex," the briefing schedule is formulated by the ”complex” or special panel in conjunction with the Legal Division, in most cases based on the parties’ responses to an order to show cause concerning a proposed briefing schedule and format.

The amount of time for briefing a "Regular Merits" case may vary, depending on whether it is a district court or agency case, whether there are intervenors or *amici*, whether there are cross-appeals, and whether there is a deferred appendix. Somewhat more problematic is determining when briefing is actually going to *commence*, since briefing is tied to the oral argument date, and that date is not normally set until all pending motions are resolved.

Deadlines are monitored by the Clerk's Office; when the deadlines are not met, the matter is called to counsel's attention by phone call, letter, or an order from the Court directing the party to show cause why certain action should not be taken. Depending on the nature of the deadline, such action could include dismissal for failure to prosecute the appeal.

The Clerk's Office has been directed to bring to the attention of the Court the names of counsel who repeatedly abuse the time limits in the rules. In extreme instances, this has led to a referral to the Court's Committee on Admissions and Grievances.

Counsel are advised that whenever there are serious settlement negotiations in progress, including post-argument settlement discussions, the parties should advise the Clerk of that fact.

3. ***Service***

(*See* Fed. R. App. P. 25; D.C. Cir. Rule 25.)

Parties or counsel filing papers must serve copies on all other parties to the case, at or before the time of filing, unless the rules provide for service by the Clerk. Service shall be on counsel if a party is represented by counsel. Service may be made in person or by mail, and is complete upon mailing. All filings must contain a certificate of service. In emergency situations, upon authorization by the Clerk,

papers may be filed with the Court and served on counsel by facsimile transmission.

4. *Dockets*

When an appeal is filed in the Court, the Clerk's Office establishes a docket using an annual sequential numbering series. Docket numbers in agency cases begin with "1000" and are prefixed by the year, *e.g.*, 93-1000, 93-1001, *etc*. Similarly, docket numbers in criminal cases begin with "3000"; docket numbers in district court civil cases in which the federal government is a party begin with "5000"; docket numbers in district court civil cases involving private parties begin with "7000"; and docket numbers in cases which have not yet been accepted for filing begin with "8000."

D. CLERK'S FEES

(*See* D.C. Cir. Rule 45.)

The Judicial Conference of the United States prescribes certain fees to be paid for services performed by the Clerk's Office, including docketing a case on appeal, searching records and certifying the results, providing copies of records or papers, certifying copies of records or papers, and providing copies of the Court's opinions. These fees, which change periodically, are set forth in a schedule appended to the Circuit Rules.

E. COMPLAINTS AGAINST JUDGES

The procedure for filing complaints against judges is set forth in the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability. A copy of these rules may be obtained from the Clerk of the Court.

III. COMMENCING THE APPEAL

A. PRELIMINARY MATTERS -- JURISDICTION

Before filing a notice of appeal or petition for review, counsel should consider the following questions:

1. Is there subject matter jurisdiction in this case?

2. Has the district court or agency fully and finally resolved all issues in the case?

3. Is the notice of appeal or petition for review timely?

4. Is there a pending motion listed in Federal Rule of Appellate Procedure 4(a)(4) that would make the filing of a notice of appeal premature?

5. Have the points of error been properly preserved?

6. Does the proposed appeal have genuine merit or is it frivolous?

It is critically important for counsel to be certain that the Court has jurisdiction to entertain the appeal. In district court cases, counsel should consult the relevant jurisdictional provisions of Titles 18 and 28 of the United States Code; in agency cases, counsel should consult the particular statutory provisions and agency regulations bearing on jurisdiction. This Handbook does not purport to provide a complete and comprehensive guide to federal appellate jurisdiction. The following summary is intended only to identify generally the bases for the Court's review of district court and agency cases.

1. *Jurisdiction -- District Court Cases*

The Court has jurisdiction over all criminal appeals and most civil appeals from the United States District Court for the District of Columbia. Ordinarily, only final judgments of the district court are reviewable. *See* 28 U.S.C. § 1291. The question whether an order is "final" may be very complex and requires careful examination of the case law and treatises on federal practice. In suits involving multiple claims or parties, counsel should consult Federal Rule of Civil Procedure 54(b), which governs appeals from district court orders that do not dispose of the entire case.

There are certain interlocutory or non-final orders that also can be reviewed, some as a matter of right, and others as a matter of judicial discretion. Interlocutory civil orders reviewable as of right consist of orders granting, continuing, modifying, dissolving, or denying injunctions, and certain orders in receivership, bankruptcy and admiralty. *See* 28 U.S.C. § 1292(a). In certain instances, a denial of a claim for immunity from suit also is immediately appealable. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity). With respect to most other interlocutory orders in civil actions, appellate review is possible only if the trial court certifies, pursuant to 28 U.S.C. § 1292(b), that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In that case, this Court, in its discretion, may permit an appeal from the order. *See also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 547 (1949).

With respect to appeals from district court cases, counsel also should bear in mind the Federal Courts Improvement Act of 1982, which transferred to the United States Court of Appeals for the Federal Circuit the jurisdiction to hear certain types of cases formerly reviewable in this Court, including appeals where the district court's jurisdiction was based "in whole or in part" on the Tucker Act. *See* 28 U.S.C. § 1295(a)(2).

2. *Jurisdiction -- Administrative Agency Cases*

The Court reviews final orders of many federal administrative agencies, as well as the Tax Court of the United States. In these cases, the Court's jurisdiction often depends on whether the petitioner resides, maintains its principal place of business, or does business within the Circuit. Moreover, the statutes providing for judicial review of certain agency decisions also may specify this Circuit as an alternative or a special forum, even where the petitioner has no contacts with the District of Columbia. Because the criteria vary from agency to agency, counsel must examine the statutory prescriptions governing reviewability of the particular administrative action in each instance.

3. *Original Jurisdiction*

To aid its appellate jurisdiction, the Court may entertain original proceedings pursuant to the All Writs Statute, 28 U.S.C. § 1651. These proceedings are usually petitions for writs of mandamus or prohibition.

4. *Collateral Review of Local Court Decisions*

The Court has no authority to entertain direct appeals from orders of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals. Only where counsel first makes a collateral challenge to a local court ruling by bringing suit in the United States District Court for the District of Columbia, and the district court enters an appealable order, can the matter be reviewed by this Court on appeal from that order.

B. APPEALS FROM THE DISTRICT COURT AS OF RIGHT

1. *How Taken*
(*See* Fed. R. App. P. 3, 7.)

Appeals from district court judgments are taken by filing a notice of appeal with the *Clerk of the district court*, at which time the fees for filing and docketing the appeal must be paid to the district court Clerk. The notice must state the court being appealed to, the ruling being appealed, and the parties who are appealing. The Clerk of the district court notifies the other parties by mail when the notice of appeal has been filed. As a matter of courtesy, however, the party taking an appeal also should serve all other parties with a copy of the notice of appeal. In civil cases, the district court may require a bond or other security to cover costs of appeal.

2. *Timing*
(*See* Fed. R. App. P. 4.)

(a) General Rules

The time prescribed for all appeals is jurisdictional. Only upon motion establishing excusable neglect or good cause may the district court enlarge the time for filing a notice of appeal, and then only for limited periods. *See* Fed. R. App. P. 4.

The time prescribed for appeal begins to run when the Clerk of the district court enters upon the docket of that court the judgment or order from which the appeal is taken. A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order will ordinarily be treated as filed after such entry and on the day thereof. If any party has filed a timely motion in the district court for relief under Federal Rules of Civil Procedure 50(b), 52(b), 59, or 60(b) (if filed no later than 10 days after entry of judgment), however, the time for appeal begins to run from the entry of the order granting or denying that motion. A notice of appeal filed

before the disposition of any of these motions has a limited effect, and a notice or an amended notice of appeal must be filed within the prescribed time measured from entry of the order disposing of the motion if the party wishes to appeal from an aspect of the judgment affected by the resolution of such a motion. *See* Fed. R. App. P. 4(a)(4).

The Clerk of the district court is required to mail notice of the entry of judgment to all parties not in default for failure to appear. A party also may serve an adversary with notice of entry. Lack of notice does not suspend the running of the time prescribed.

(b) Civil Cases

If the United States, or an officer or agency thereof, is a party to a case in the district court, unless provided otherwise by statute, the notice of appeal must be filed within 60 days after entry of the judgment or order, regardless of which party is appealing. If the government is not a party, the notice of appeal must be filed within 30 days.

If one party files a timely notice of appeal, any other party may file a notice within 14 days thereafter, even though the usual time to appeal would have expired. Thus, if one party files a notice of appeal on the 29th day in a case in which the government is not a party, another party may file a notice of appeal on the 43rd day. If one party files a notice of appeal on the 5th day, however, the other party may still wait until the 30th day to file a notice of appeal. If more than one timely appeal is filed, the 14-day period begins to run from the time the first appeal is filed.

(c) Criminal Cases

The defendant must appeal within ten days after entry of the judgment or order appealed from. The government has 30 days to

appeal in those limited situations when it is allowed to do so by statute. *See* 18 U.S.C. §§ 3731, 3742.

A timely motion for arrest of judgment, or for a new trial on any ground other than newly discovered evidence, terminates the running of the time prescribed for appealing from a criminal conviction. A motion for a new trial on the ground of newly discovered evidence also terminates the running of time to file a notice of appeal, if the motion is made within ten days of the entry of judgment. A new ten-day period within which to appeal from the judgment, as well as from the denial of the motion for new trial, begins to run after entry of the order denying the motion. *See* Fed. R. App. P. 4(b); Fed. R. Crim. P. 33, 34.

Absent extraordinary circumstances, direct criminal appeals will not be held in abeyance pending the filing and disposition of a postconviction motion in the district court. This practice alters the supervisory rule of procedure adopted by the court in *United States v. Cyrus,* 890 F.2d 1245, 1247 (D.C. Cir. 1989). *See* D.C. Cir. Rule 47.5.

(d) Collateral Challenges in Criminal Proceedings

Petitions for writs of habeas corpus and motions attacking sentence under 28 U.S.C. § 2255 are civil cases for purposes of computing the time for appeal and for purposes of the Court's procedures. Parties should consult appropriate authorities to determine whether other proceedings are deemed civil or criminal in nature to determine the appropriate filing period.

C. INTERLOCUTORY APPEALS FROM THE DISTRICT COURT UNDER 28 U.S.C. § 1292(b)

(*See* Fed. R. App. P. 5.)

1. *How Taken*

Interlocutory appeals from the district court under 28 U.S.C. § 1292(b) are taken, after the district court has issued the necessary certification, by filing with the Clerk of this Court an original and four copies of a petition for permission to appeal, with proof of service on all parties to the action in the district court. The petition must state the controlling question of law sought to be appealed, the facts necessary to understand the question, the reason that the question is disputable, and why an immediate appeal may advance the ultimate disposition of the case. The petition must include a copy of the order appealed from, as well as any findings, conclusions, or opinion related to it, particularly the district court's statement of the reasons why interlocutory review is appropriate under 28 U.S.C. § 1292(b).

Since the petition is not itself an appeal, but rather is a request to the Court asking that docketing of the appeal be allowed, a docketing fee is not required unless the Court grants the petition.

The adverse party may respond to the petition within seven days. There is no oral argument on the application unless the Court so orders. The Court refers these petitions to a special panel for disposition as soon as the matter has been fully briefed.

If the Court grants permission to appeal, a notice of appeal is unnecessary. This Court enters an order granting permission to appeal, and transmits a certified copy of it to the Clerk of the district court. This certified copy serves as a notice of appeal. The appellant pays the docketing fee to the Clerk of the district court at that time, and the case is then transmitted to the Legal Division for screening.

2. ***Timing***

The petition for permission to appeal under 28 U.S.C. § 1292(b) must be filed within ten days after the date of the interlocutory order containing the statement prescribed in the statute, or within ten days after the date the district court amends a prior order to include the district judge's statement required by that section.

D. APPEALS FROM THE TAX COURT

(*See* Fed. R. App. P. 13, 14.)

1. *How Taken*

These appeals are taken by filing a notice of appeal with the Clerk of the Tax Court in the District of Columbia. Filing by mail is permitted. The notice must identify the court to which the appeal is taken, the ruling being appealed, and the party who is appealing. The Clerk of the Tax Court notifies the other parties by mail that a notice of appeal has been filed, but it is good practice for the party taking an appeal also to serve all other parties with a copy of the notice of appeal.

2. *Timing*

The notice of appeal must be filed within 90 days after entry of the decision of the Tax Court. If a timely notice is filed, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the decision. A notice of appeal mailed and postmarked *before* the prescribed time expires, but received *after* it expires, is treated as timely under 26 U.S.C. § 7502.

A motion to vacate or revise a decision, timely filed under the Rules of Practice of the Tax Court, terminates the running of time for filing a notice of appeal from that decision. The new time begins to run for all parties from entry of an order disposing of the motion, or from entry of a new decision, whichever is later.

E. REVIEW OF ADMINISTRATIVE AGENCY ORDERS

(*See* Fed. R. App. P. 15; D.C. Cir. Rule 15.)

1. *How Obtained*

To obtain review of an administrative agency order, a party must file a petition for review (or other document prescribed by the applicable statute) with the Clerk of this Court. The petition for review must designate the party seeking relief, the respondent(s), and the order to be reviewed. The respondent is the appropriate agency or officer of that agency. Some statutes also require the United States to be named as a respondent, and some statutes require the petitioner to attach a copy of the agency order or rule for which review is sought. The petitioner must file an original and four copies of the petition for review. In addition, the petitioner must serve a copy of the petition on all other parties who were participants in the agency proceeding, except in informal rulemaking proceedings, such as, for example, those covered by the Administrative Procedure Act, 5 U.S.C. § 553, or other statutory authority. In these informal rulemaking cases, petitioner need serve copies only on the respondent agency, and on the United States if required by statute. Counsel also must file with the Clerk a list of those served. When the number of parties filing comments in informal rulemaking proceedings is not too great to impose an undue burden, it is courteous to serve those parties with a copy of the petition for review, although a copy of the agency order need not be attached.

2. *Timing*

The time for filing the petition for review is prescribed by the statute that sets forth the procedures for obtaining judicial review of the particular agency's orders.

3. *Intervention*

Unless the applicable statute provides otherwise, a party who wishes to intervene must file a motion for leave to intervene with the Clerk of the Court, with service on all parties to the proceeding before this Court. The motion must contain a concise statement of the party's interest in the case, and the grounds for intervention. The motion must be filed within 30 days of the filing of the petition for review. A motion to intervene in a proceeding before this Court concerning direct review of an agency action will be deemed to be a motion to intervene in all cases before the Court involving the same agency action or order, including later filed cases, unless the moving party specifically advises otherwise. An order granting such a motion has the effect of granting intervention in all such cases.

F. ENFORCEMENT OF ADMINISTRATIVE AGENCY ORDERS

1. *How Obtained*

(*See* Fed. R. App. P. 15(b).)

When authorized by statute, a party may seek enforcement of an administrative agency order by filing an application with the Clerk of this Court. A cross-application for enforcement also may be filed by a respondent to a petition for review, if the Court has jurisdiction to enforce the order. Any application for enforcement must contain a concise statement of the proceedings in which the order sought to be enforced was entered, the party against whom the order is to be enforced, the facts upon which jurisdiction and venue are based, and the relief prayed. The applicant must file with the Clerk the original of the application for enforcement, four copies, and a copy for each respondent. The Clerk serves the respondents; the petitioner serves all other parties who participated before the agency.

The respondent to the enforcement petition must serve and file an answer within 20 days. Where no answer is filed, the Court will enter a judgment in favor of the moving party.

2. *Timing*

The time for filing an enforcement application is prescribed by the applicable statute.

G. ORIGINAL PROCEEDINGS

(*See* Fed. R. App. P. 21; D.C. Cir. Rule 21.)

1. *How Taken*

A party seeking a writ of mandamus or prohibition directed to a judge, or seeking any other extraordinary writ, must file an original and four copies of a petition with the Clerk of this Court, with proof of service on the respondent judge or agency, and on all parties to the action in the trial court or to proceedings before the agency. The petition must contain a statement of the issues, the necessary facts, the relief sought, and the reason the writ should issue. It must include copies of any relevant order or opinion and necessary parts of the record. Circuit Rule 21 prescribes the manner of captioning the action.

The Court handles petitions for extraordinary writs in the same way as dispositive motions, referring them to a special panel for disposition. *See infra* Part VII.D. If the panel finds the petition to be without merit, it may deny the petition without calling for an answer. Otherwise, the panel issues an order fixing a time within which an answer must be filed. Unless otherwise provided, there is no oral argument.

2. *Timing*

No time limits are applicable.

3. *Petitions for Writs of Mandamus Challenging District Court Transfers*

Any order by the district court transferring a case to another district is not an appealable order. Therefore, litigants seeking to challenge such a transfer frequently file petitions for mandamus with this Court. *See In re Scott*, 709 F.2d 717 (D.C. Cir. 1983) (per curiam). *See also supra* Part III.G.1. Once physical transfer of the original record takes place, however, jurisdiction is exclusive in the transferee court and this Court has no power to review the transfer decision. *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (*en banc*). The district court has agreed to delay the actual transfer of the record for a period of 20 days from the date of the order directing transfer. If this Court receives a petition for mandamus within that 20-day period, the Clerk's Office immediately requests, by letter, that the transfer be delayed indefinitely, to allow this Court the opportunity to consider the matter. Upon receipt of the letter, the Clerk of the district court will hold the case until notified that this Court has disposed of the petition.

4. *Petitions for Writs of Mandamus Alleging Unreasonable Agency Delay*

The Court has identified a category of petitions for writ of mandamus to compel administrative agency action unreasonably delayed. *See In re GTE Serv. Corp.*, 762 F.2d 1024, 1026 n.5 (D.C. Cir. 1985); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). These petitions are treated in the same manner as other petitions for writ of mandamus, *i.e.*, petitions are limited to 20 pages, the petition is initially considered by the special panel, and no petition will be granted unless the Court orders a response.

H. JOINT APPEALS

(*See* Fed. R. App. P. 3(b), 15(a).)

Persons entitled to appeal whose interests make joinder practicable may file a joint notice of appeal or petition for review, or they may join in an appeal after filing separate timely notices or petitions. Parties taking joint appeals must list individually each appellant or petitioner. The Court also may consolidate appeals on its own or upon motion. *See infra* Part V.A.

I. CROSS-APPEALS

Appellees, in cases appealed from the district court, may generally, without filing a cross-appeal, defend a judgment on any ground consistent with the record, even if that ground was rejected or not considered in the district court. *See Granfinanciera S.A. v. Nordberg*, 492 U.S. 33 (1989). They cannot, however, attack the judgment, either to enlarge their own rights or to lessen the rights of their adversary, except by filing a cross-appeal. A cross-appeal also is necessary where appellees seek to correct an error in, or to supplement, the district court's judgment. Unless the parties otherwise agree and notify the Clerk's Office, the party that files the first notice of appeal files the first brief. *See* Fed. R. App. P. 28(h). The time for taking cross-appeals is set out *supra* at Part III.B.2.b.

J. APPEALS EXPEDITED BY STATUTE

(*See* Fed. R. App. P. 9(a); D.C. Cir. Rule 47.2.)

For several categories of appeals, the Federal Rules of Appellate Procedure and the Circuit Rules expressly prescribe special procedures. For example, the following matters are to be expedited, but this list is not exhaustive: appeals by the government from dismissal of an indictment or information or from suppression of evidence in a criminal proceeding, pursuant to 18 U.S.C. § 3731; appeals by recalcitrant witnesses from summary confinement, pursuant to 28 U.S.C. § 1826; appeals from denial or grant of pretrial release

in criminal cases, pursuant to 18 U.S.C. § 3145; appeals from habeas corpus proceedings, pursuant to 28 U.S.C. chapter 153; appeals of certain orders entered in any case brought by the Federal Deposit Insurance Corporation, pursuant to 12 U.S.C. § 1821(q)(1); and appeals from any action for temporary or preliminary injunctive relief, pursuant to 28 U.S.C. § 1657(a). Counsel should consult these statutes and the relevant rules with care. Prompt notification to the Clerk's Office by counsel intending to file such an appeal is essential to enable the Court to begin immediate preparation for prompt disposition. It is particularly important that counsel notify the Court in writing of arrangements for preparation of all necessary transcripts and for transmittal of relevant portions of the record.

Other sections of this handbook bear on emergency motions, motions for release pending appeal, and the calendaring of emergency and expedited appeals. *See infra* Parts VIII.A, B, C.

K. CASES WITH RECORDS UNDER SEAL

(*See* D.C. Cir. Rule 47.1.)

Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this Court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed. Matters under seal may not be filed in the Court of Appeals drop box. *See supra* Part II.C.2.

In any case in which the record in the district court or before an agency is under seal in whole or in part, each party must review the record to determine whether any portions of the record under seal should remain under seal on appeal. If a party determines that some portion should be unsealed, that party should seek an agreement on the unsealing. Such agreement should be promptly presented to the district court or agency for its consideration and issuance of an appropriate order. *See* D.C. Cir. Rule 47.1(b). *See also infra* Parts VIII.H (discussing motions to unseal), IX.A.9 (discussing briefs

containing material under seal), IX.B.7 (discussing appendices containing matters under seal).

IV. DOCKETING THE APPEAL

A. CASES FROM THE DISTRICT COURT AND THE TAX COURT

1. *Preliminary Record on Appeal and Preparation of Transcripts*

(*See* Fed. R. App. P. 10.)

The preliminary record on appeal, prepared in the district court Clerk's Office or the Tax Court Clerk's Office, consists of a copy of the notice of appeal and a copy of the district court docket entries. Upon receipt of the preliminary record, the Case Administrator in this Court's Clerk's Office dockets the appeal, assigns it a number, and gives notice of the filing to all parties by issuing an order scheduling certain submissions. In addition, the Case Administrator checks to see that the docketing fee has been paid and sends appropriate notice if it has not.

The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the Clerk of the district court, constitute the record on appeal. The parties may correct errors or omissions in the record by stipulation. In the event of a dispute, this Court has the power to require that the record be corrected or amplified, but disputes about the accuracy of the record should first be submitted to the district court.

Within ten days of filing the notice of appeal in a civil case, appellants must order from the court reporter a transcript of such parts of the proceedings not already on file as they consider necessary to dispose of the appeal.

In criminal cases, it is the policy of this Court to expedite appeals. Counsel has the responsibility for assuring expeditious preparation of the transcript in a criminal appeal. If any unusual problems arise with the court reporter, they should be brought to this Court's attention immediately. Where the defendant proceeded *in forma pauperis* in the district court, that court, by local practice, requires appointed counsel to order the transcript at the same time as filing the notice of appeal. In a criminal case in which the defendant did not proceed *in forma pauperis*, this Court requires the transcript to be ordered within three days of filing the notice of appeal.

Unless the entire transcript is ordered, the appellant should file with the Clerk's Office and serve on the appellee a designation of the parts of the transcript ordered, and a statement of the issues to be presented on appeal. The appellee has ten days to file and serve a cross-designation of additional parts of the transcript. If the appellant refuses to order the additional portions, appellee should do so, or ask the district court to compel the appellant to comply.

When, as is often the case, a complete transcript has been made during the trial, and it is filed with the Clerk, no designation need be made. The parties, however, should include in the appendix to the briefs only those portions of the transcript that are pertinent to the appeal. Awards of costs and sanctions may be imposed where a party has included unnecessary material in the appendix. *See infra* Part IX.B.

If no transcript is available, the appellant may prepare and file with the district court a statement of the evidence or proceedings from the best available means, including recollection, and serve it on the appellee. The appellee has ten days to serve objections or proposed amendments in response. The district court then approves the statement as submitted or amended, and certifies it to this Court as the record on appeal.

As with transcript designations, the parties are encouraged to agree on what exhibits are necessary to resolve the appeal, but in the absence of an agreement they may cross-designate exhibits.

In civil cases, the district court returns the exhibits to the parties who filed them. In criminal cases, the exhibits are given to the United States Attorney. If a party wants an exhibit in the courtroom during oral argument to this Court, counsel should notify the Court of his or her intention and should deliver the exhibit to the district court clerk's office for transmittal to this Court. If the Court requests an exhibit, the parties will be notified and directed to deliver the exhibit to the district court for transmittal to this Court.

2. ***Transmission of the Record***
(*See* Fed. R. App. P. 11; D.C. Cir. Rule 11.)

The district court does not transmit records to this Court unless the Clerk's Office requests the record -- usually when the appeal in question has been set for oral argument. Additionally, cases with voluminous records remain in the district court Clerk's Office unless otherwise ordered by the Court.

The district court routinely transmits the preliminary record in all cases a few days after the notice of appeal is filed. The preliminary record consists of the notice of appeal and a copy of the district court docket. Counsel should keep in mind that, unlike other federal circuits, briefing schedules in this Court, where the case has been scheduled for argument, are *not* computed from the date on which the record is filed in this Court. Rather, under the Court's Case Management Plan, briefing schedules are usually computed *back* from the date set for oral argument, and are established by order. *See infra* Part IX.A.1.

3. *Docketing the Appeal*

(*See* Fed. R. App. P. 12; D.C. Cir. Rule 12.)

After an appeal has been docketed, the Clerk's Office sends out an initial scheduling order that specifies the dates on which the docketing statement and initial submissions, procedural motions, and dispositive motions are due. In civil cases, the order provides that the appellant, within 30 days, shall file an original and four copies of a docketing statement on a form provided by the Clerk's Office, and must serve a copy on all other parties and *amici curiae*. The docketing statement includes information about the type of case, the district court or agency case number, relevant dates, the order sought to be reviewed, a non-binding preliminary statement of the issues involved, related cases, preparation of the transcript, relevant statutes, and counsel's name, address, and telephone number. A copy of the district court judgment under review must be submitted with the docketing statement. This material assists the Clerk's Office and the Legal Division in screening and classifying all new appeals, identifying related cases in this Court, and detecting possible jurisdictional problems. The information about preparation of the transcript is especially important to ensure against delays as the case is processed. The parties also may include a stipulation to be placed in the stand-by pool for argument or a request to be included in the Court's mediation program. *See infra* Part IV.D (discussing the Court's mediation program), and Part X.E.4 (discussing the requirements to enter the stand-by pool).

Counsel must attach to the docketing statement a provisional certificate setting forth the information specified in Circuit Rule 28(a)(1), identifying parties, intervenors, and *amici* in the district court proceedings and in this Court, including a disclosure statement required by Circuit Rule 26.1. Circuit Rule 26.1 requires corporations, associations, joint ventures, partnerships, syndicates, or other similar entities appearing before the Court to file a disclosure statement that identifies all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. The

statement also must identify the represented entity's general nature and purpose, as relevant to the litigation, and if the entity is unincorporated, the statement must include the names of any members of the entity that have issued shares or debt securities to the public. No listing need be made, however, of the names of members of a trade association or professional association.

In civil cases, oral argument dates and panels are usually set *before* the briefs are filed; thus, the provisional certificate filed with the docketing statement is necessary to enable the Clerk's Office to avoid assigning the case to be heard by a judge who would be recused because of his or her association with a party or counsel in the case.

Appellees or intervenors must file, within seven days of service of the docketing statement or the granting of an intervention motion, any disclosure statement required by Circuit Rule 26.1. *See* D.C. Cir. Rule 12(f).

B. CASES FROM ADMINISTRATIVE AGENCIES

(*See* Fed. R. App. P. 16, 17; D.C. Cir. Rule 15, 17.)

In cases from administrative agencies, docketing occurs at the time the petition for review is filed, and precedes transmission of the record. The petitioner must pay the docketing fee to this Court at that time. For information required with the docketing statement, *see supra* Part IV.A.3.

The record on review consists of the order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence, and proceedings before the agency. The record may later be corrected or supplemented by stipulation or by order of this Court, as in the case of an appeal from the district court.

Because of a lack of storage space, the record before the administrative agency is not transmitted to this Court at the time of docketing; only a certified index to the record is submitted by the

agency. Any party to the proceeding may, by motion, subsequently request that part or all of the record be transmitted to the Court, or the Court on its own may require the same. It is the duty of the agency to maintain the record so that it can be transmitted to the Court with a minimum of delay. In most cases, however, transmission of the actual record will be unnecessary because the appendix should contain those documents necessary for the Court's review.

The administrative agency submits to this Court the certified index to the record within 40 days of the filing of the petition for review or application for enforcement, unless the statute authorizing review fixes a different time. The date of filing the certified index is deemed to be the date the record is filed.

C. ORIGINAL PROCEEDINGS

No record is prepared or transmitted to the Court in original proceedings. However, the petitioner seeking a writ of mandamus or other extraordinary relief must pay the docketing fee before the petition will be accepted for filing. The petition should have attached those documents from the prior proceedings necessary for an understanding of the matter. An appendix may be utilized.

D. MEDIATION PROJECT

In May 1987, the Court initiated an experimental mediation project under the direction of the Circuit Executive. This program has been permanently adopted by the Court. Program procedures are described in the Court's order, included as Appendix III to the Court's rules. Cases docketed in the Court are screened by the Legal Division and the Director of the ADR Program, and those deemed appropriate for mediation are ordered into the program. Procedures are explained to counsel when a case is selected for mediation.

V. MULTIPARTY CASES

A. CONSOLIDATION

In order to achieve the most efficient use of the Court's resources, as well as to maintain consistency in its decisions, the Court generally will consolidate, on its own motion or on motion of the parties, all appeals and cross-appeals from the same district court judgment or order, and all petitions for review of agency orders entered in the same administrative proceeding. In addition, other cases involving essentially the same parties or the same, similar, or related issues, may be consolidated. When cases are consolidated, the Clerk's Office designates one case (usually the one with the lowest docket number) as the "lead" case, and enters all items filed in any of the consolidated cases only on the docket of the lead case.

As noted in Part III.H, *supra*, parties with common interests also may file a joint notice of appeal or petition for review.

Once cases are consolidated, they are treated as one appeal for most purposes. They generally follow a single briefing schedule; they are assigned for hearing on the same day before the same panel; argument time is allotted to the cases as a group; and they are decided at the same time. Each case retains some of its individual identity, however. For example, motions may be filed in one case and not in others, and extensions of time in one case do not necessarily extend the time in any others. Although joint briefs are encouraged pursuant to Federal Rule of Appellate Procedure 28(i), the parties may file separate briefs in each case, unless the Court orders otherwise. Briefing by intervenors is governed by Circuit Rule 28(e). *See infra* Part IX.A.3.

B. CIVIL APPEALS MANAGEMENT PLAN

In an effort to deal more effectively with its caseload, the Court in 1978 adopted a plan to manage civil appeals and administrative

agency cases, under the direction of the Chief Staff Counsel (currently the Director of the Legal Division). The Court has extended this plan to multi-party criminal appeals. The objectives of this plan are: (1) to achieve an efficient and organized presentation of appeals in complex, multi-party litigation; (2) to identify early in the appellate process cases that either are not ripe for review or are appropriate for summary disposition; and (3) to enhance the Court's control of the pace of the appellate process. An important characteristic of the plan is its flexibility and informality. Although the Director of the Legal Division ordinarily determines which cases will require special attention or management under the plan, counsel for the parties are encouraged to notify the Director or the Clerk of cases that may be appropriate for such treatment.

In carrying out the plan, the Director of the Legal Division is authorized to obtain from counsel information that will assist the Court in making decisions about the appointment of lead or liaison counsel, joint briefing, briefing schedules, motions dispositions, and oral argument dates and formats. The Director may obtain this information informally by letter or telephone, by meeting with counsel, or by requesting the Clerk's Office to issue directives to counsel.

In any case pending before the Court, counsel may independently develop proposals to facilitate briefing and other matters, and submit such proposals to the Legal Division. On the recommendation of the Director of the Legal Division, the Clerk's Office may issue procedural orders that reflect the agreement of counsel. Where agreement is not achieved, or where the Director believes the circumstances warrant it, the Court will issue procedural orders in cases managed under the plan.

VI. APPEALS *IN FORMA PAUPERIS* AND PURSUANT TO THE CRIMINAL JUSTICE ACT; APPOINTMENT OF COUNSEL

A. WHEN PERMITTED

(*See* Fed. R. App. P. 24; D.C. Cir. Rule 24.)

The district court and this Court are authorized by 28 U.S.C. § 1915 (as amended effective April 26, 1996) and Federal Rule of Appellate Procedure 24 to allow an appeal, civil or criminal, to be taken without payment of the docketing fee or costs by a non-incarcerated person who makes an affidavit of indigency. While an incarcerated litigant may also proceed *in forma pauperis,* the prisoner shall be required to pay the full amount of the filing fee -- albeit in monthly installments. *See* 28 U.S.C. § 1915 (b). Any person who has been permitted to proceed *in forma pauperis* in the district court may proceed *in forma pauperis* in this Court, unless the district court finds and states in writing that the appeal is not taken in good faith, or that the party is otherwise not entitled to that status. If a party wishes to claim *in forma pauperis* status for the first time in this Court, he or she must first apply to the district court and, if permission is granted, no further authorization from this Court is necessary. If that party is a prisoner, however, a fee will nonetheless be assessed by this Court.

If the district court denies permission to proceed on appeal *in forma pauperis*, or revokes *in forma pauperis* status previously granted in the district court, the party may, within 30 days of receipt of notice of the district court's action move this Court for leave to proceed on appeal *in forma pauperis*. The filing of a new notice of appeal is not required. If the Court grants the motion, the docketing fee is waived for non-incarcerated parties but will be assessed for incarcerated parties; if the Court denies the motion, the appellant must pay the docketing fee or the appeal will be dismissed.

A party to an administrative agency proceeding who wishes to take an appeal or file a petition for review *in forma pauperis* must file a motion with this Court for leave to so proceed.

B. DISTRICT COURT DISMISSAL OF SUITS BROUGHT *IN FORMA PAUPERIS*

Under 28 U.S.C. § 1915(e) (formerly § 1915 (d)), the district court may dismiss a civil suit in which the plaintiff seeks to proceed *in forma pauperis* if the court concludes that the action is "frivolous or malicious." *See Denton v. Hernandez*, 504 U.S. 25 (1992) (discussing the "frivolous or malicious" standard).

In *Sills v. Bureau of Prisons*, 761 F.2d 792 (D.C. Cir. 1985), this Court established procedures to be followed by the district court in dismissing a complaint under section 1915(d) (effective April 26, 1996 -- 1915 (e)), in order to facilitate appellate review. The district court must provide a clear statement of reasons for its conclusion that the suit is frivolous or malicious, and the court also should revoke the plaintiff's *in forma pauperis* status when it dismisses the complaint. This latter procedure permits this Court to evaluate the correctness of the section 1915(e) dismissal in the context of ruling on appellant's motion to proceed *in forma pauperis* on appeal.

C. PROCEDURAL CONSEQUENCES OF *IN FORMA PAUPERIS* STATUS (*See* D.C. Cir. Rule 24.)

In addition to being excused from posting security for costs, an appellant or petitioner proceeding *in forma pauperis* also is automatically exempted from filing the usual number of briefs. A non-incarcerated litigant is also excused from prepaying court fees and costs. A party proceeding *in forma pauperis* need file only the original of the brief or motion. The Clerk will make the necessary copies for the Court. Appointed counsel in criminal appeals may elect to file all 15 copies with the Clerk, with the expense of reproducing the brief by photocopy process being reimbursable under the Criminal

Justice Act ("CJA"). Note, however, that the other parties, who are not *in forma pauperis*, must file the standard number of briefs required by the Circuit Rules.

The Court decides appeals *in forma pauperis* on the original record without an appendix. Under Circuit Rule 24, however, the appellant or petitioner must file with his or her brief one copy of those pages of the trial transcript the appellant or petitioner wishes to call to the Court's attention, one copy of a list designating those pages of the transcript, and one copy of any other portions of the record to which the appellant or petitioner wishes to direct the Court's attention. Although the Clerk will reproduce enough copies of these items to serve them on counsel for the appellee or the respondent, and to provide them to the panel, parties are encouraged to provide the Court with four copies of these items so as not to delay processing of the case. The appellee or respondent must furnish with the brief, four copies of any additional pages of transcript or portions of the record to which the Court's attention is directed.

D. APPOINTMENT OF COUNSEL

1. *Time and Manner of Appointment*

The CJA, 18 U.S.C. § 3006A, does not provide for the appointment of counsel in non-criminal cases. Thus, even though a party in a civil appeal may be granted leave to proceed *in forma pauperis*, counsel will not ordinarily be provided by the Court. The appellant may file a motion for the appointment of counsel. If the Court grants the motion, it may refer the appellant to a legal aid organization, or a law school clinical program, or it may appoint a private attorney who has indicated a willingness to serve without compensation in non-criminal cases.

In civil cases the appointment of counsel is made by the panel granting the motion. Counsel who wish to be considered for appointment in civil cases should write to the Clerk, providing

information about their background and experience, and listing any cases they have previously handled in this Court. Counsel appointed in civil appeals serve without compensation. Counsel are encouraged to volunteer their services for civil matters.

In all direct appeals from criminal convictions in which the defendant was represented by counsel appointed under the CJA, no new motion for appointment of counsel in this Court is necessary. The same is true when the defendant was not proceeding *in forma pauperis* in the district court, but the district court has granted a motion for leave to do so on appeal, or the district court has determined that the defendant is financially unable to obtain counsel.

This Court maintains a separate list of attorneys to serve as appointed counsel on appeal under the CJA. If the defendant was represented under the CJA in the district court by an attorney who also is on this Court's list, the attorney will ordinarily automatically be appointed to represent the defendant on appeal. If the attorney representing the defendant in the district court is not on this Court's CJA list, then the matter of appointment of counsel is referred to the Office of the Federal Public Defender.

If counsel who represented a defendant in the district court under the CJA does not wish to represent the defendant on appeal, counsel should so indicate on the docketing statement filed with the notice of appeal. Ordinarily such requests are granted, and the matter of appointment of counsel on appeal is then referred to the Office of the Federal Public Defender.

When a criminal case is referred to the Office of the Federal Public Defender, that organization determines if it is able to represent the defendant on appeal. If it is, it notifies the Court. If the Office of the Federal Public Defender is not able to provide the representation, it notifies the Court of an attorney on the Court's list who is able to provide the representation. This is ordinarily done on a rotational basis. After considering the ability of the Office of the Federal Public

Defender to provide the representation, or the recommendation of the Office of the Federal Public Defender to appoint counsel from the Court's CJA list, the Court appoints counsel.

Counsel who wish to become members of the Court's CJA list should contact the Office of the Federal Public Defender for information. Counsel should keep in mind, however, that there are relatively few appointments under the CJA in this Court. Counsel appointed in criminal appeals are sent the appropriate CJA form to be completed for claiming compensation at the end of the case.

2. *Withdrawal*

Appointed counsel who are unable to continue to represent an appellant in a civil or criminal appeal should make a prompt motion to this Court to withdraw, stating specific reasons.

In a criminal appeal, if counsel wishes to withdraw because of a belief there is no merit to the appeal, counsel should refer to *Anders v. California*, 386 U.S. 738 (1967), and *Suggs v. United States*, 391 F.2d 971 (D.C. Cir. 1968), for guidance. Counsel in a criminal appeal also should confer with the Office of the Federal Public Defender to help assure uniformity of practice in this regard.

Counsel must serve the appellant with the motion to withdraw. When filing a motion to withdraw because of lack of merit to the appeal in a criminal case, counsel also must submit to the Court and serve on the appellant, *but not on government counsel*, a confidential memorandum setting forth the points the appellant wishes to assert, any other points counsel has considered, and the most effective arguments counsel can make on the appellant's behalf. The Court gives the appellant 30 days to respond to this memorandum; if the Court thereafter concludes there are no meritorious issues on appeal, it will grant counsel's motion to withdraw, and ordinarily dismiss the appeal.

3. *Duties in Criminal Appeals*

Upon notice of appointment in a criminal appeal, counsel should so advise the appellant, and if the appellant is incarcerated, counsel should explore the possibility of obtaining release pending appeal. *See infra* Part VIII.C. Counsel also should check the district court record to ensure that the transcript has been or is being prepared. It is trial counsel's duty to order the transcript when the notice of appeal is filed, but counsel appointed on appeal should make sure that all necessary portions of the transcript have been designated. The failure of trial counsel to order the necessary transcript does not justify an extension of time for filing appellant's brief.

Appointed counsel ordinarily should interview the defendant in person at least once if the appellant is within the jurisdiction. If the defendant is incarcerated outside the jurisdiction, the Court may authorize counsel to visit the defendant at his or her place of incarceration. Such visits must be approved in advance and must be fully justified in order for counsel to be reimbursed. Requests for such advance authorization are first to be submitted to the Federal Public Defender.

If the appellant is dissatisfied with court-appointed counsel's handling of the appeal and wishes counsel to withdraw, counsel should file a motion for leave to withdraw, and the Clerk will refer the matter to the Legal Division for presentation to a panel. *See infra* Part VII.D. The Court does not respond favorably to general complaints about counsel; only to specific grievances.

Counsel's responsibility when appointed in a criminal case extends through the filing of a nonfrivolous petition for a writ of *certiorari*. Appointed counsel must advise the defendant of the right to file a *certiorari* petition and counsel's opinion as to the merit and likelihood of success in obtaining such a writ. If the defendant asks counsel to file a petition for writ of *certiorari* and there are nonfrivolous grounds for doing so, counsel must prepare and file one. If counsel determines

that there are no nonfrivolous grounds for filing a petition, counsel shall, within twenty days of judgment, notify the defendant in writing that counsel will not file a petition, briefly explaining why. Counsel shall also inform the defendant about the procedures both for filing a petition for *certiorari* pro se and for asking the court of appeals to appoint new counsel to prepare a petition for *certiorari*. Counsel should caution the defendant that it is unlikely the court will appoint new counsel and that the client should be prepared to file a petition for *certiorari* pro se within the prescribed time. Once the counsel has provided this notice to the client, counsel shall notify the court that counsel's representation has ceased. The Clerk shall notify the defendant in writing of the effective date of the termination of counsel's appointment. The cost of this work is recoverable in this Court pursuant to the original appointment, and counsel should not submit his or her voucher until all work is completed. Failure to comply with the foregoing procedures may result in the Court's refusal to approve counsel's voucher.

4. *Compensation*

The CJA prescribes the rate at which appointed counsel is compensated for time spent in court, and for time spent on the case out of court. While total compensation is limited to a specific dollar amount in direct criminal appeals and collateral proceedings, the Chief Judge, or another judge designated by the Chief Judge, may authorize payments in excess of these limitations. Awards of excess compensation are not made lightly in view of budgetary constraints, and require strong justification and documentation.

Counsel also may be reimbursed for certain out-of-pocket expenses, including the cost of reproducing the briefs. General office costs are not reimbursable.

Counsel must submit claims for reimbursement to the Clerk within 45 days of the date after which no further action before this Court or the Supreme Court is possible. Counsel's claims should be itemized

on the voucher form sent to counsel by this Court at the time of the appointment. Records of time spent on the appeal should be indicated on the standard work-sheets available from the Clerk. The Clerk reviews the claim form for mathematical and technical accuracy and for conformity with applicable regulations. The completed form is then sent for approval to the judge who wrote the opinion in the case, or, if no opinion was issued, to the presiding judge of the panel.

VII. MOTIONS PRACTICE

A. FORMAL REQUIREMENTS

(*See* Fed. R. App. P. 27, 32(b); D.C. Cir. Rule 27.)

Motions practice in this Court has become a means of achieving early resolution of cases that would otherwise unnecessarily go the full route of briefing and oral argument. Parties are particularly encouraged to file dispositive motions where a sound basis exists for summary disposition. The result can be a major savings of time, effort, and resources for the parties, counsel, and the Court. In order to achieve this economy, however, it is essential for counsel to comply fully with the procedural requirements for motions practice. The following section discusses general motions practice; specific motions are discussed *infra* at Part VIII.

At the outset, there are two important time limits to observe: 30 days from docketing for filing procedural motions; and 45 days from docketing for filing dispositive motions. The actual dates when both types of motions are due are specified in the initial order sent out by the Clerk's Office at the time of docketing.

Procedural motions are those that may affect the progress of the case through the Court, *e.g.*, motions for intervention; motions for consolidation; motions to defer the appendix; motions to hold the case in abeyance; motions for stay; motions to expedite; and motions for leave to participate as *amicus curiae*.

Dispositive motions are defined in Circuit Rule 27(g) as those which, if granted, would dispose of the appeal or the petition for review in its entirety, or would transfer the case to another court. They include motions for summary affirmance or reversal; motions to dismiss (on any grounds, including jurisdiction); and motions to transfer. Absent special leave of Court, dispositive motions may not be filed more than 45 days after docketing. This requirement does not apply to a motion by an appellant for voluntary dismissal, which may be filed at any time.

Normally, cases will not be given oral argument dates or briefing schedules until all pending motions have been resolved. Counsel can assist the Clerk's Office in processing the case by stipulating within the first 45 days that no dispositive motions will be filed. Any motions filed after the oral argument date is set are referred to the panel assigned to hear the case on the merits.

There are certain formal requirements common to most motions. Counsel must file an original and four copies, except in *en banc* cases, in which an original and 19 copies are required. Motions, responses thereto and replies must be prepared in conformity with Federal Rule of Appellate Procedure 32. Thus, all papers relating to motions may be submitted in standard typographical printing or by any duplicating or copying process that produces a clear black image on white paper. Except by permission or direction of the Court, a motion must not, under any printing method utilized, exceed a total of 20 pages, including any memorandum submitted in support of such motion. Counsel are encouraged to submit one combined pleading rather than a separate motion and a separate memorandum.

The front page of the motion should give the name of this Court, the title and file number of the case, and a brief descriptive title (*e.g.*, Motion for Summary Affirmance). If a case has been scheduled for oral argument, has already been argued, or has been submitted without oral argument, a motion, response or reply must so state in

capital letters at the top of the first page. Where applicable, the date of the argument also should be included.

The motion should specify the grounds and the relief sought. Parties may seek more than one form of relief in a single motion if the matters are related. For example, a single motion may be filed where, in addition to seeking summary affirmance, a party requests to exceed the page limit for filing such motion or seeks leave to file the motion. If a party seeks more than one form of relief in a single motion, the descriptive title on the front page of the motion should clearly set forth the matters presented in the pleading. If the matters are unrelated, parties should file separate motions.

All motions must be signed by a party or by a member of the bar of the Court, with proof of service on all other parties to the proceeding before the Court. Motion papers by letter are not permitted except for *pro se* litigants proceeding *in forma pauperis*. For motions, responses, and replies, filing is complete on *receipt* of the pleading in the Clerk's Office, *not* on mailing.

A response may be filed within seven days after service of the motion. It may not exceed 20 pages. It may contain a motion for other relief. If so, the caption must clearly denote that the response includes the separate motion and the document may not exceed 30 pages. A reply to the response may be filed within three days after service of the response and may not exceed ten pages. When the response includes a motion for affirmative relief, the reply may be joined in the same pleading with a response to the motion for affirmative relief, and counsel has seven days to file it. Such reply may not exceed 20 pages. The final reply on a combined filing is limited to 10 pages. Replies must not reargue positions presented in an opening paper and should not present any matters that are not strictly in reply to the response. After the filing of a reply, no further pleadings on a motion or petition are permitted, except by leave of the Court. The above filing times are extended by three days if service was effected on the responding party by mail.

When a substantive motion is filed along with a motion for leave to file out of time or to exceed the length limitations, no response is required on the substantive motion until a decision is rendered on the motion to file out of time or to exceed the length limitations.

Circuit Rule 27(h) establishes the requirements for seeking extensions of time to file motions, responses, and replies, and for seeking leave to exceed the page limits. A request for extension of time to file a motion is due ten days before the motion would be due; a request for extension of time to file a response is due three days before the response would be due; and a request for extension of time to file a reply is due two days before the reply would be due. The same deadlines apply to requests to exceed page limits. A motion to extend time for filing a motion, response, or reply should indicate in the first paragraph when the motion, response, or reply is currently due.

Counsel should bear in mind that the Circuit Rules set page limits on motions, responses, and replies, and explicitly state that requests to exceed those limits are disfavored and will be granted "only for extraordinarily compelling reasons." D.C. Cir. Rule 27(h)(3).

Circuit Rule 27(h)(2) establishes requirements for consulting opposing counsel to obtain opposing counsel's consent to motions for extension of time and motions to exceed the page limit, and to inquire whether an opposition or other form of response will be filed. The opening paragraph of any such motion must recite the position taken by other counsel, or the efforts made to obtain their position. Where other counsel have indicated an intention to file an opposition or other form of response, or have not been reached after reasonable effort, counsel for the moving party must serve the motion by personal service. If personal service is not feasible, counsel for the moving party must give other counsel telephone notice of the filing and serve the motion by the most expeditious form of mail or overnight delivery service. Where counsel for the moving party is unable to effect personal service or telephone notice at the time of the filing, the

opening paragraph of the motion must recite the efforts made to do so. In such cases, any opposition or response to the motion must be made within three days after personal service or telephone notice.

Finally, Circuit Rule 27(h)(4) provides for an automatic extension of the original deadline for filing motions or petitions, or to exceed length limits for such pleadings, if the motion is filed in accordance with the requirements of subparagraphs (1) and (2) of Circuit Rule 27(h) and the Court does not act on the motion by the end of the second business day before the filing deadline. If the Court thereafter denies the motion, the filing deadline will be extended automatically for the following periods from the date of the order denying the motion: for responsive pleadings that must be filed within three days of pleadings to which they respond, four days; for all other pleadings, six days. If the Court denies the motion to extend the length, it ordinarily will allow time to file a conforming motion. *This automatic extension provision applies **only** to motions deadlines; there are no comparable provisions in the Circuit Rules for automatic extension of the deadline for filing briefs*. Motions to extend time or length limits for filing briefs are separately addressed in Circuit Rule 28(f).

B. PROCESSING

When counsel files a motion, it is handled in one of three ways, depending on the nature of the relief sought: by the Clerk; by a panel designated to decide motions; or by the merits panel in the case.

Motions are generally considered ripe for decision once a reply has been filed or the time allowed for a reply has expired. An exception is made for emergency motions, discussed below, and for procedural motions that reflect the consent of all parties. Motions filed in cases assigned to merits panels are delivered immediately to the judges. It is in the merits panel's discretion whether to await a response.

C. DISPOSITION BY THE CLERK

(*See* Fed. R. App. P. 27(a); D.C. Cir. Rule 27(e).)

The Circuit Rules authorize the Clerk to dispose of unopposed procedural motions of a routine character, in accordance with the Court's instructions.

Any party adversely affected by the action of the Clerk on a motion may petition for reconsideration within ten days of entry of the Clerk's order. The motion for reconsideration will be submitted to a special panel or to the merits panel, if a merits panel has been assigned.

Motions disposed of by the Clerk can be identified by the form of the order. Orders are typewritten and signed by the Clerk "For the Court." Clerk's orders never carry the phrase "Per Curiam" above the signature block.

D. DISPOSITION BY A PANEL

The Clerk's Office refers all contested dispositive and procedural motions to the Legal Division. The Legal Division assigns each motion (or all motions in a single case) to one of the staff attorneys, who reviews the motion, response, and reply, and any other papers filed; examines the record; and then prepares a confidential memorandum setting forth the issues, the facts, an analysis of the law, and a recommended disposition. The staff attorney also drafts a proposed order, and, where appropriate, an accompanying memorandum disposing of the motion. Except for emergency matters and motions to expedite or to hold a case in abeyance, the Legal Division generally assigns motions chronologically by filing date, and staff attorneys work on motions in that order.

Once the staff attorney has completed work on the motion, his or her recommendation, proposed disposition, and the underlying pleadings are routed either to the special panel or to a regular panel for resolution.

The special panel consists of three judges who sit together for two months during the term to consider and decide all dispositive motions, cases recommended for disposition without oral argument under Circuit Rule 34(j), and all emergency matters on referral from the Legal Division. *See infra* Part VIII and Part XI.C.2. The special panel members also are engaged in their regular merits sittings while they serve on the special panel.

The special panel typically meets in conference with the staff attorneys, the Director of the Legal Division, and the Clerk once every two weeks during its two-month assignment. The Legal Division circulates to the panel an agenda and the dockets, papers, and recommendations of the staff attorneys regarding all motions ripe for disposition. At the conference, the panel may adopt or reject the staff attorney's recommendation; request more research; take the matter under advisement; or refer the motion for disposition to the panel ultimately assigned to hear the case on the merits.

The Court does not publish or disclose in advance the names of the judges on the special panel, nor does it notify counsel or the public of the conference date on which a particular motion will be considered. The panel does not hear oral argument on motions, except, very rarely, in emergency matters or for extraordinary cause.

If a party disagrees with the special panel's disposition of a motion, it may move for reconsideration by the same panel. The Court rarely grants these motions.

Orders of the special panel disposing of motions are usually not published, although in some cases the panel may decide that a published *per curiam* opinion will be useful to establish the law of the Circuit on a particular issue. The unpublished orders are typewritten, and reflect the names of the panel members beneath the case caption. Cases are often affirmed for the reasons stated by the district court, or the agency. Otherwise, a memorandum explaining the basis for the Court's disposition of the motion may accompany the order.

Non-dispositive, procedural motions are handled by the Legal Division in the same way as dispositive motions: written recommendations are prepared by staff attorneys and circulated with the motions papers and a proposed order to the special panel for disposition. These motions are usually resolved in unpublished orders, accompanied by memoranda when appropriate. Counsel may petition the panel to reconsider its disposition of the motion, but such requests for reconsideration are rarely granted.

E. DISPOSITION BY A MERITS PANEL

Once a case is assigned to a merits panel -- ordinarily when counsel receives the briefing schedule, and in "complex" cases, at the time the case is designated "complex" -- everything relating to the case comes under the exclusive control of the panel. All motions filed in the case are submitted to the panel.

When a motion is filed, the Clerk sends it to the panel with a vote sheet. The vote sheet contains information for the panel's consideration, including references to related papers already filed or to be filed. The vote sheet may be accompanied by a memorandum from the Director of the Legal Division, recommending a particular disposition. At the bottom of the vote sheet the panel members indicate the disposition they wish to make of the motion. The Clerk's Office maintains a record of the judges' votes, and when all votes are received, an order is prepared disposing of the motion. The order usually shows the names of the three judges on the panel.

F. DISTRIBUTION OF ORDERS

The Clerk's Office files and distributes all orders. The Clerk mails a copy of the order to attorneys who have entered their appearance in the case and whose names appear on the Court's docket. If more than one attorney is listed at the same address, only one copy of the order will be sent, and it will be mailed to the attorney whose name appears

first on the docket sheet or the attorney who is designated as counsel of record. The Clerk's Office maintains a record of all attorneys to whom copies of an order are mailed.

VIII. SPECIFIC MOTIONS

A. MOTIONS FOR STAY OR EMERGENCY RELIEF

(*See* Fed. R. App. P. 8; D.C. Cir. Rules 8, 27(f).)

Filing a notice of appeal, or obtaining permission to appeal, generally does not automatically stay the operation of the judgment or order under review. Except in cases involving money judgments against the United States or the District of Columbia, or where the appellant posts a *supersedeas* bond in accordance with Federal Rule of Civil Procedure 62(a), the losing party must move to obtain a stay or injunction pending appeal to prevent immediate execution of the judgment or order being appealed, or immediate enforcement of an agency order under review. Such motions are procedural motions; they can be filed as soon as possible, but usually no later than 30 days after docketing.

Counsel must first apply for a stay from the district court or agency whose order is being appealed or explain why a stay was not sought from the district court or agency. If the district court or agency denies the relief requested, counsel may then apply to this Court. A motion for a stay should describe any prior applications for relief and their outcome, or explain any failure to apply first to the district court or agency for the relief requested.

If the facts are in dispute, counsel should furnish evidentiary material supporting the request for a stay. Counsel should include

relevant portions of the record with the motion. At a minimum, these include a copy of the judgment or order involved, and any explanation, written or oral, that accompanied the ruling. The motion also should contain, in a prominent place, a specific statement of the time exigencies involved.

Since many motions for stay are filed on an emergency basis, counsel should carefully review Circuit Rules 8 and 27(f), which prescribe the procedures for seeking emergency relief. In particular, counsel or a party must identify the motion as an "Emergency Motion," and file it at least seven days before the date on which court action is necessary, or explain why the motion could not have been filed sooner. Where counsel gives only a vague or general explanation as to why it was not filed at least seven days before the date of the requested court action, the Court may conclude that expedited consideration of the motion is unwarranted.

Counsel seeking expedition of a stay application or any other matter must communicate the request for emergency consideration in person or by telephone to the Clerk's Office and to opposing counsel. The motion should be served by hand or, in the case of out-of-town counsel, by another form of expedited service. In the case of out-of-town counsel, parties may wish to consult with the Clerk concerning facsimile service. *See supra* Part II.C.3. The motion or accompanying memorandum must describe the efforts made to notify opposing counsel.

When an emergency motion is filed in a case not yet assigned for hearing on the merits, it is referred to the Director of the Legal Division for assignment to a staff attorney and immediate referral to the special panel for disposition. The special panel does not normally grant the relief requested before receiving a response. However, it may enter an administrative stay of very short duration before receiving a response to give the Court more time to consider the matter. The stay order will usually direct that responses to the motion be expedited. Alternatively, the special panel may order expedited

responses without issuing a temporary stay. If the judges conclude that the matter does not require unusual expedition, they will take no action prior to the filing of a response.

The motion for stay or for emergency relief must specifically discuss four factors: (1) the likelihood that the moving party will prevail on the merits; (2) the prospect of irreparable injury to the moving party if relief is withheld; (3) the possibility of substantial harm to other parties if relief is granted; and (4) the public interest. *See Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). In seeking a stay or injunction pending appeal, counsel also should address the question whether the appeal should be expedited if a stay or injunction is granted.

A party filing or opposing a motion for stay or other emergency relief may, in addition or in the alternative, file a motion to dispose of the appeal or petition for review in its entirety. If the Court grants a motion for stay or for injunction pending appeal, it may, pursuant to Federal Rule of Appellate Procedure 8(b), condition the stay or injunction on the posting of a bond or other security in the district court. No such bond is required where the federal government is the appellant. *See* Fed. R. Civ. P. 62(e).

B. MOTIONS TO EXPEDITE CONSIDERATION OF THE APPEAL

(*See* 28 U.S.C. § 1657; D.C. Cir. Rules 27(f), 47.2.)

The Court accords expedited consideration to a case when required to do so by statute, or when the Court grants a motion for expedition.

Circuit Rule 47.2(a) lists many of those statutory provisions that mandate expedited appellate review: 18 U.S.C. §§ 3145, 3731; 28 U.S.C. chapter 153; and 28 U.S.C. § 1826. *See supra* Part III.J. Whenever a party takes an appeal pursuant to one of these provisions,

counsel must advise the Clerk of this Court immediately both orally and by letter. The district court Clerk will transmit the notice of appeal and certified docket entries forthwith to this Court, so that the appeal can be docketed, and an expedited briefing and argument schedule set. Counsel should advise the Clerk of this Court in writing of counsel's arrangements to order any necessary portions of the transcript on an expedited basis, and make arrangements with the district court Clerk to send the record promptly to this Court.

When expedition is not required by statute, counsel seeking expedited review must file a motion. Like other procedural motions, motions to expedite must be filed within 30 days of the date the case is docketed. Because of the size of the Court's caseload, and the calendaring of cases months in advance of hearing, the Court grants expedited consideration very rarely. The movant must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge. The Court also may expedite cases in which the public generally, or in which persons not before the Court, have an unusual interest in prompt disposition. The reasons must be strongly compelling.

When the Court disposes of a motion for stay or injunction pending appeal, it may at the same time expedite the case to minimize possible harm to the parties or the public. In moving for a stay or injunction pending appeal, counsel should address the question of the appropriateness of expediting the appeal if a stay is entered.

An order granting expedition does not automatically shorten the briefing schedule or dispense with the printing of briefs and appendices. The order usually advises counsel of the sitting period during which the case will be heard. When time is a critical consideration, counsel may wish to propose a specific date for the hearing and to move for an abbreviated briefing schedule.

When counsel files a motion to expedite consideration of an appeal, the Clerk's Office refers it to the Legal Division. Staff attorneys give priority to such motions.

Parties also can allow their appeal to be calendared earlier than normal by agreeing to place their case in the Court's stand-by pool of cases for oral argument. The requirements to enter the stand-by pool are discussed *infra* in Part X.E.4.

C. MOTIONS FOR RELEASE PENDING APPEAL

(*See* 18 U.S.C. § 3143; Fed. R. App. P. 9(b); D.C. Cir. Rule 9(b).)

A defendant who has filed a notice of appeal from a criminal conviction may apply for release while the appeal is pending. The defendant must apply first to the district court for release. If the district court denies the application, or imposes conditions of release, the defendant may then move this Court for release, or for modification of the conditions. A new notice of appeal is not necessary. Circuit Rule 9 sets forth the required contents of this motion. The motion may not exceed 20 pages without leave of the Court, and it must be served on opposing counsel. Staff attorneys give priority to motions for release pending appeal, and send them to the special panel for disposition as soon as a recommendation is prepared.

The criteria for release are specified by statute and rule. *See* 18 U.S.C. § 3141; Fed. R. App. P. 9. The burden is on the defendant to show that he will not flee or pose a danger to others if released, *and* that the appeal is not for purposes of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If this Court denies the motion for release, the defendant may seek Supreme Court review by submitting an application for release on conditions to the Circuit Justice for the District of Columbia Circuit,

who is the Chief Justice of the United States. Counsel must file the application with the Clerk of the Supreme Court, and must serve the opposing party pursuant to Rule 29 of the Rules of the Supreme Court. Such motions are rarely granted.

D. MOTIONS FOR VOLUNTARY DISMISSAL

An appeal from the district court not yet docketed in this Court may be dismissed by the district court. Once an appeal has been docketed, however, it can be dismissed only by this Court.

In a civil appeal or agency proceeding, the parties may stipulate that the case should be dismissed, or the appellant or the petitioner may file a motion, with service on opposing counsel, requesting dismissal and indicating whether the other parties agree. Before joining in a request for dismissal, the parties also should attempt to reach an agreement as to who will pay costs, if any.

In a criminal case, counsel *must* submit a motion to the Court requesting dismissal, with service on opposing counsel. The motion must be accompanied by an affidavit from the appellant, stating that the appellant has been fully informed of the circumstances of the case and of the consequences of a dismissal, and wishes to dismiss the appeal. The affidavit also must recite the appellant's satisfaction with the services of counsel.

E. MOTIONS FOR REMAND

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a

party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g.*, *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the *record* is remanded, such as where additional fact finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. "If that court indicates that it will grant the motion, the appellant should then make a motion in this Court for a remand of the case in order that the district court may grant the requested relief on this." *Smith v. Pollin*, 194 F.2d at 350.

F. MOTIONS TO TRANSFER

Motions to transfer are dispositive motions that, pursuant to the initial scheduling order, must be filed within 45 days of the date the case is docketed.

In the context of administrative agency cases, a motion to transfer is predicated on the Court's power under 28 U.S.C. § 2112(a) to transfer a case to any other court "[f]or the convenience of the parties in the interest of justice." In addition, where this Court concludes that it lacks jurisdiction over an appeal or a petition for review, the Court may, instead of dismissing the case outright, order it transferred to a court where jurisdiction exists. *See* 28 U.S.C. § 1631.

G. MOTIONS FOR SUMMARY DISPOSITION

Motions for summary affirmance or summary reversal must be filed within 45 days of the date the case is docketed. Parties are encouraged to file such motions where sound basis exists for summary disposition.

Motions for summary disposition may be granted in whole or in part. Summary affirmance is appropriate where the merits are so clear as to justify summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (per curiam); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Motions for summary reversal are rarely granted, and only where the merits are "so clear, plenary briefing, oral argument, and the traditional collegiality of the decisional process would not affect [the Court's] decision." *Sills v. Federal Bureau of Prisons*, 761 F.2d 792, 793-94 (D.C. Cir. 1985). Parties should avoid requesting summary disposition of issues of first impression for the Court.

H. MOTIONS TO UNSEAL

Parties or other interested persons may move at any time to unseal any portion of the record in this Court, including confidential briefs or appendices filed under Circuit Rule 47.1. *See* D.C. Cir. Rule 47.1(c). If the case arises from the district court, the motion will ordinarily be referred to that court, and, if necessary, the record will be remanded for that purpose. This Court, however, may, when the interests of justice require, decide such a motion itself. If unsealing is ordered by the Court, the record will be remanded to the district court for unsealing. Unless otherwise ordered, the filing of a motion to unseal any portion of the record does not delay the filing of any brief under any scheduling order.

IX. BRIEFS AND APPENDIX

A. BRIEFS

(*See* Fed. R. App. P. 24, 28-32; D.C. Cir. Rules 24, 25, 28-32.)

A well-written brief is of prime importance to success on appeal. Three precepts should guide counsel in drafting briefs:

1. Be clear.

2. Cite the record and legal authorities fully, fairly, and accurately and, in particular, cite to controlling D.C. Circuit law.

3. Be concise.

The 1993 revision of the Circuit Rules makes several important changes in briefing requirements. For example, it contains new word or page limits for regular parties, intervenors, and *amici*. In addition, it requires consolidated briefing where feasible by intervenors on the same side and *amici* (except for government *amici*) on the same side.

1. *Timing*

Normally, the Clerk's Office establishes a briefing schedule after the case has been screened and classified by the Legal Division, and after any pending motions in the case have been resolved. In cases designated as "Regular Merits" cases, counsel receive a single order fixing the date for oral argument and setting the briefing dates back from the oral argument date, with the final brief due approximately 30 days before the case is to be heard.

In general, the appellee's or respondent's brief is due 30 days after the appellant's or petitioner's. A reply brief, if filed, is due 14 days later. The Clerk's Office works additional time into the briefing schedule to accommodate Circuit Rules 28(e) and 29, which provide

for staggered briefing by intervenors and *amici* -- 15 days after the brief of the party whom they support -- to avoid repetition of factual statements or legal arguments made in the principal briefs. A briefing schedule also will contain additional time where the Court has granted the parties leave to file a deferred appendix, as provided in Federal Rule of Appellate Procedure 30(c). *See infra* Part IX.B.3.

In view of the proximity of briefing to oral argument, the Court strongly disfavors motions to extend the briefing schedule. Such motions will be granted only for extraordinarily compelling reasons. In those extraordinary situations where counsel must seek such an extension, Circuit Rule 28(f)(2) requires the motion to be filed at least ten days before the main briefs are due, and at least five days before the reply brief is due. Circuit Rule 28(f)(3) requires that, before filing the motion, counsel must attempt to obtain the consent of other counsel, and must recite in the motion the result of such an attempt. Circuit Rule 28(f)(3) also specifies the requirements for service of motions to extend time or to exceed the word or page limits. Counsel should be aware that, while the Court will attempt to rule on the motion prior to the date on which the brief is due, submission of a motion to extend time or exceed word or page limits does not toll the time for compliance with the filing requirements for briefs. Under Circuit Rule 28(f)(4) movants are required to meet all filing requirements absent an express order from the Court granting a waiver.

If the appellant or petitioner fails to file the opening brief within the time allowed by the Court, the appellee or respondent may move to dismiss the case, or the Court may dismiss it on the Court's own motion. If the appellee or respondent fails to file a timely answering brief, the Court may order the case submitted on the appellant's or petitioner's brief alone. Circuit Rule 34(f) forecloses oral argument by any party who fails to file a brief, except by permission of the Court.

2. *Consolidated, Joint, and Cross-Appeals*

(*See* Fed. R. App. P. 3(b), 28; D.C. Cir. Rule 28.)

Parties with common interests in consolidated or joint appeals must join in a single brief where feasible. The Court has admonished counsel in recent orders that it looks with extreme disfavor on the filing of duplicative briefs in consolidated cases. To avoid repetitious arguments, a party may adopt or incorporate by reference all or any part of the brief of another.

It is important in consolidated cases that the parties caption their briefs correctly and uniformly. Thus, each brief cover should bear the lead docket number and corresponding case name. It also should reflect the particular docket number and case name pertaining to that party.

In cross-appeals, the first party to appeal is deemed to be the appellant for purposes of setting the briefing schedule, unless the Court orders otherwise or the parties agree and notify the Clerk's Office at the time the docketing statements are filed in civil cases, or at the time the final transcript status report is filed in criminal cases. The brief of the appellee serves both as the answering brief to appellant's appeal and as the main brief on appellee's appeal. For word or page limitation purposes, both appellant's and appellee's opening briefs are treated as principal briefs. They are limited to 12,500 words if prepared by word processing systems or using standard typographical printing in any typeface at least 11 points in height, or 50 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch. *See* D.C. Cir. Rule 28(d). The appellant's second brief constitutes the answering brief to the appellee's appeal as well as the appellant's reply brief. For word or page limitation purposes, it also is treated as a principal brief. The appellee may file a second brief, but only in reply to the appellant's answer on the appellee's cross-appeal. That brief is limited to 6,250 words if printed or prepared by word processing systems, or 25 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch. *See infra* Part IX.A.6. Further

briefing requires permission of the Court. *See* D.C. Cir. Rule 28(d).

3. *Amici Curiae and Intervenors*
(*See* Fed. R. App. P. 29; D.C. Cir. Rules 28(e), 29.)

A brief of an *amicus curiae* may be filed only by written consent of all the parties or by leave of the Court, unless the *amicus* is the United States or an officer or agency thereof, a state, a territory, the District of Columbia, a Commonwealth of the United States, or has been appointed by the Court. Governmental entities, however, must submit a notice of an intent to file an *amicus* brief. *See* D.C. Cir. Rule 29(b). A motion for leave to file an *amicus* brief should set forth the interest of the *amicus* and the reasons why briefing is desirable. Motions for leave to participate *amicus curiae*, or written representation of the consent of all parties to such participation, are due within 30 days of docketing, unless the Court grants an extension for good cause. Parties seeking leave to participate as *amicus curiae* after the merits panel has been assigned or at the rehearing stage should be aware that the Court will not accept an *amicus* brief where it would result in the recusal of a member of the panel or recusal of a member of the *en banc* Court.

The rules define an "intervenor" as an interested person who has sought and obtained this Court's leave to participate in an already instituted proceeding. *See* D.C. Cir. Rule 28(c). Briefs of *amici* and intervenors are limited to 8,750 words if prepared by word processing systems or using standard typographical printing in any typeface at least 11 points in height, or 35 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch. *See* D.C. Cir. Rule 28(d). The briefs are due approximately 15 days after the brief of the party that the intervenor or *amicus* supports, and the briefs may not repeat facts or legal arguments made and adequately elaborated upon in the parties' briefs. Circuit Rule 28(e)(4) requires consolidated briefing by intervenors on the same side, to the extent practicable. Similarly,

Circuit Rule 29(d) requires *amici curiae* on the same side to join in a single brief, to the extent practicable. Where an intervenor or *amicus* files a separate brief, counsel must certify in the brief why a separate brief is necessary. Grounds that are *not* acceptable as reasons for filing a separate brief include representations that the issues presented require more pages than allowed under the Court's rules; that counsel cannot coordinate filing a single brief because of geographical dispersion; or that separate presentations were permitted in the proceedings below. When a governmental entity is an *amicus curiae* or an intervenor, it is not required to file a joint brief with other *amici* or intervenors. For this purpose, a governmental entity includes the United States or an officer or agency thereof, a state, a territory, the District of Columbia, or a Commonwealth of the United States. An intervenor supporting an appellant or petitioner may file a reply brief when the appellant's or petitioner's reply brief is due, but an *amicus* may not file a reply brief unless otherwise directed by the Court. Reply briefs for intervenors are limited to 4,400 words if printed or prepared by word processing systems, or 17 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch.

4. ***Number of Copies***
(*See* Fed. R. App. P. 31(b); D.C. Cir. Rule 31.)

Except when the appeal is *in forma pauperis*, 15 copies of each brief must be filed with the Clerk and two copies served on each party separately represented. Parties proceeding *in forma pauperis* need file only the original typewritten copy of the brief, and the Clerk's Office will duplicate the necessary copies.

If the Court grants leave to file a deferred appendix (*see infra* Part IX.B.3), the parties are required to file only seven copies of their briefs initially.

5. ***Format***

(*See* Fed. R. App. P. 32(a); D.C. Cir. Rules 28(a), 28(d), 32.)

Briefs may be prepared by: (1) word processing systems; (2) standard typographical printing; or (3) typewriters. Briefs prepared by word processing systems or standard typographical printing may be printed in any typeface of at least 11 points in height. Briefs prepared by either word processing systems or typewriters must be double-spaced and printed on one side of the page only. Evasion of the length limitations may result in the Court's rejection of the brief.

Briefs other than those submitted by a party proceeding *in forma pauperis* must have colored covers as follows: appellant - blue; appellee - red; intervenor or *amicus curiae* - green; appellant's reply - gray; supplemental brief - yellow. In cases designated "Complex," the cover of the briefs and the first page of motions and other pleadings should indicate the designation "Complex." In cases being considered for disposition without oral argument under Circuit Rule 34(j), the cover of the briefs and the first page of motions and other pleadings should indicate "Case being considered for treatment pursuant to Rule 34(j)."

The front cover of the brief must set forth the following: (1) the name of this Court; (2) the docket number of the appeal and the caption of the case, including the docket number and caption of the lead case in a consolidated appeal; (3) the nature of the proceeding and the name of the court or agency below (*e.g.*, Appeal from the United States District Court for the District of Columbia; Petition for Review of an Order of the Federal Communications Commission); (4) the title of the document (*e.g.*, Brief for Appellant); (5) the names, addresses, and telephone numbers of counsel representing the party filing the brief; and (6) the date on which the case has been scheduled for oral argument. One of the attorneys designated on the cover must be a member of the bar of the Court, except as otherwise provided by law.

If a brief does not conform to the Federal Rules of Appellate Procedure and/or to the Circuit Rules, counsel is called and so advised. Counsel is directed either to file a conforming brief (if the problems are numerous) or an errata to the brief (if the problems are minor). If the brief exceeds the pages or word count, counsel is directed to submit either a corrected brief or a motion for leave to exceed pages limits.

6. ***Length***
(*See* Fed. R. App. P. 28(g); D.C. Cir. Rules 28(d), 28(f), 28(g).)

Briefs cannot exceed the word or page limitations set forth in Circuit Rule 28(d) absent the Court's permission. Principal briefs are limited to 12,500 words if prepared by word processing systems or using standard typographical printing in any typeface at least 11 points in height, or 50 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch. The 11-point requirement applies both to briefs prepared by word processing systems and by typographical printing. *See* D.C. Cir. Rule 28(d). Reply briefs are limited to 6,250 words if prepared by word processing systems or standard typographical printing in any typeface at least 11 points in height, or 25 pages if prepared by a typewriter. Typewritten briefs must be typed in a non-proportional typeface with no more than ten characters per inch. These limits do not include the table of contents, table of authorities, certificate of parties, rulings, and related cases, the glossary, and any addendum containing statutory material or regulations. *However, the summary of argument, footnotes, and citations are included for purposes of computing the word or page limits.*

Parties filing briefs prepared by word processing systems or standard typographical printing must submit along with the brief a certification, signed by counsel of record or, in the case of parties filing briefs *pro se*, by the party, that the brief contains no more than the number of words allowed by Circuit Rule 28(d). For purposes of

this certification, counsel may rely on word counts reported by word processing systems. However, for purposes of the certification, counsel must determine that the word processing system counts words in footnotes and citations. Parties using word processing systems that do not count words may use the page limitations set out for typewritten briefs, *e.g.*, 50 pages for principal briefs and 25 pages for reply briefs, in non-proportional typeface with no more than ten characters per inch.

Parties who wish to submit a brief that exceeds the word or page limitations set forth in Circuit Rule 28(d) must file a motion with the Court requesting permission to exceed the word or page limitations not less than ten days before the filing of a main brief and not less than five days before the filing of a reply brief. Such motions are decided by the panel assigned to hear the case, and they are granted only for extraordinarily compelling reasons.

7. *Contents*
(*See* Fed. R. App. P. 28; D.C. Cir. Rule 28.)

Briefs must contain the following in the order indicated. Note, however, that intervenors and *amici* may not be required to include each of the specified items in their briefs.

(a) A "Certificate as to Parties, Rulings, and Related Cases" immediately inside the cover of the brief and preceding the table of contents. Three items must be included in this certificate:

i. The certificate must identify by name all parties, intervenors and *amici* who appeared below (except in direct review of an agency informal rulemaking), and all parties, intervenors, or *amici* in this Court. The appellee or the respondent may omit from the certificate those listed by the appellant or the petitioner but must identify the briefs in which the lists are set forth. The certificate also must include the name of any publicly-owned parent,

subsidiary, or affiliate of any corporate entity or partnership of the certifying party. Circuit Rule 28(a)(1)(A) specifies precisely what must be included as to corporate entities, and counsel should consult that provision for greater detail.

ii. The certificate must identify the rulings under review, including the date, the name of the district court judge, the place in the appendix where the ruling is reproduced, and any official citation to the ruling, the Federal Register or other citation when the ruling is an agency decision, or a statement that no such citation exists. In briefs filed after the opening brief, the certificate may incorporate by reference the opening brief's certificate of ruling under review, but must so indicate.

iii. The certificate must indicate whether the case was previously before this or any other court, and, if so, identify it by court number and caption. The certificate also must identify "related cases," as defined in Circuit Rule 28(a)(1)(C), or state that there are none.

(b) A table of contents, with page references.

(c) A table of cases, statutes, and other authorities cited, arranged alphabetically and referring to the pages of the brief where they are cited. The table should either include asterisks in the left margin to denote those authorities upon which counsel chiefly relies or state that there are none.

(d) A glossary defining abbreviations and acronyms, other than those that are part of common usage. *See* D.C. Cir. Rule 28(a)(3).

(e) A statement indicating the basis for the Court's subject matter and appellate jurisdiction, with statutory citations and, if necessary, relevant case citations. *See* Fed. R. App. P. 28(a); D.C. Cir. Rule

28(a)(4). The basis for the district court's or agency's subject matter jurisdiction also must be included. If the basis of the district court's or agency's subject matter jurisdiction or this Court's jurisdiction is in dispute, the parties should so state and should reference the pages in the brief that address this issue.

(f) A section containing pertinent statutes and regulations. *See* D.C. Cir. Rule 28(a)(5). If these are extensive, they may either be included as an addendum bound with the brief or be bound separately. If they are contained in another party's brief, they may be incorporated by reference.

(g) A statement of the issues presented for review, which appellee or respondent may omit if satisfied with appellant's or petitioner's statement.

(h) A statement of the case consisting of a procedural history indicating the nature of the case, the course of proceedings, and the disposition below; and a statement of the facts relevant to the issues presented for review, with appropriate references to the record. If the brief is prepared at the same time as or after the appendix, and the relevant portions of the record are reproduced in the appendix, references must be to appendix pages, not to the record itself. If the Court grants leave to file a deferred appendix, counsel should refer to the record in the initial brief filed and add or substitute the appendix citations when the brief is filed in final form. *See infra* Part IX.B.3. Counsel for the appellee or respondent may omit or shorten the statement of the case if satisfied with that of the appellant or petitioner.

(i) A summary of argument that contains a succinct, clear statement of the arguments made in the body of the brief. The summary may not be a mere repetition of the argument headings.

(j) The argument, which contains the contentions of the parties on the issues presented, with citations to authorities, statutes, and portions of the record upon which the parties rely.

(k) A succinct conclusion setting forth the precise relief sought.

Citation requirements for briefs are set out in Circuit Rules 28(b) and 28(c). Counsel should cite D.C. Circuit decisions to the Federal Reporter and state court decisions to the National Reporter System. Parallel citations to the U.S. App. D.C. for D.C. Circuit decisions are no longer required. All federal statutes, including those applicable to the District of Columbia, should be cited by the current official code or its supplement, or, if there is no current official code, to the current unofficial code or its supplement. Citation to the official session laws is not required unless there is no code citation.

Under Circuit Rule 28(c), counsel may not cite as precedent the unpublished orders, judgments, sealed opinions, or explanatory memoranda issued by this Court. This rule also applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals, unless the issuing court of appeals allows citation. Counsel *may* refer to an unpublished disposition when arguing that it has binding or preclusive effect, but not for its effect as precedent. Counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief. However, it should be separated from the body of the brief and any other addendum by a distinctly colored separation page. If the addendum is bound separately, counsel must file and serve it concurrently with, and in the same number of copies as, the brief itself.

Counsel should avoid use of designations such as "appellant" and "appellee." In the interest of clarity, it is preferable to use the designations in the court or agency below, the actual names of the parties, or terms descriptive of them, such as "the employee."

The excessive use of footnotes also should be avoided. The Court prefers that substantive arguments not be made in footnotes. Footnotes should be used primarily for citations.

Finally, counsel should not refer this Court to sections of pleadings filed in the district court to support those contentions upon which it relies on appeal in lieu of addressing such arguments in the brief.

8. *Supplemental Briefs and Letters*
(*See* Fed. R. App. P. 28(j); D.C. Cir. Rule 28(g).)

Counsel may file, no later than seven days before argument, a concise supplemental brief if necessary to "update" the case. The supplemental brief, which should have a yellow cover, may cite and discuss only cases, statutes, rules, and any other relevant authorities that have been issued subsequent to, or relevant events that have occurred subsequent to, that party's last brief. When pertinent and significant authorities come to a party's attention after briefing or oral argument but before decision, a party may promptly advise the Clerk by letter with copies to all counsel as provided in Federal Rule of Appellate Procedure 28(j). In the letter, the party should refer either to the page in the brief or to the point argued orally to which the authorities pertain and, without presenting argument, state the reasons for providing the supplemental authorities. Other parties may file a response to the supplemental letter, but any response must be similarly limited.

9. *Briefs Containing Material Under Seal*
(*See* D.C. Cir. Rule 47.1(d).)

If it is necessary to refer in a brief to material under seal, two sets of briefs must be filed. The briefs are to be identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy -- Sealed Material

Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed brief and 15 copies of the public brief must be filed with the Clerk, and two copies of the public brief and two copies of the brief under seal served on each party, if such party is entitled to receive the material under seal. Both sets of briefs must comply with the remainder of these rules, including Circuit Rule 28(d), on the length of briefs. Litigants proceeding *in forma pauperis* must file one copy of the sealed brief and one copy of the public brief. Briefs filed with the Court under seal are available only to authorized Court personnel and are not made available to the public.

B. APPENDIX

(*See* Fed. R. App. P. 30; D.C. Cir. Rule 30.)

1. *Contents*

While the original record is available to the judges, it may contain far more than is necessary to a proper disposition of the case. To reduce the record to a manageable size, counsel must prepare an appendix, reproducing those parts of the record that are relevant to the issues on appeal. The Court does not require parties proceeding *in forma pauperis* to file an appendix.

The appendix must include the relevant docket entries in the proceeding below; the relevant portions of the pleadings, charge, findings, or opinion; the judgment or order in question; and any other parts of the record to which the parties intend to direct the Court's particular attention. Exhibits, which include hearing transcripts, need not be included but may be reproduced in a separate volume. Memoranda of law should not be included in the appendix unless there is an issue as to which arguments were raised in the district court or some point that was admitted below. Failure to include relevant parts of the record in the appendix does not preclude the Court or the parties from relying on that material.

The appendix should contain a table of contents describing each item included, with the page of the appendix on which it can be found. This is followed by the relevant docket entries, and then by the other items from the record, set out in chronological order. All the material in the appendix should be consecutively paginated to facilitate citation to the appendix in the briefs.

2. *Preparation*

The appellant or the petitioner bears the burden of preparing the appendix, but the parties are encouraged to agree informally on the contents. If the parties do not agree, the appellant or the petitioner must, not later than ten days after the date on which the record is filed, serve on the appellee or the respondent a designation of the parts of the record the appellant or petitioner intends to include in the appendix. If the appellee or the respondent deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant or the petitioner, the appellee or the respondent must, within ten days after receipt of the designation, serve upon the appellant or the petitioner a designation of those parts. The appellant or the petitioner must include in the appendix the parts thus designated with respect to the appeal and any cross-appeal. In designating parts of the record for inclusion in the appendix, the parties should have regard for the fact that the entire record is always available to the Court for reference and examination, and should not engage in unnecessary designation.

The appellant or the petitioner pays for the appendix, but may be reimbursed when costs are taxed at the conclusion of the case. If the appellant or the petitioner believes that opposing counsel is designating material that is unnecessary, the appellant or the petitioner may request the appellee or the respondent to advance the cost of reproducing the materials. If either party causes the inclusion of unnecessary material in the appendix, the Court may require that party to bear the cost of reproducing it, and the Court also may impose sanctions.

Parties to a joint appeal file a joint appendix. In consolidated cases where there are several appellants, the parties must designate someone to assume the primary responsibility for preparation of the joint appendix. Intervenors may ask the appellant or the petitioner to include certain material in the appendix, or they may include that material as an addendum to their brief, or submit it as a separate volume of the appendix.

If anything material to the appeal is inadvertently omitted from the appendix, the Clerk, on the written request of any party, may allow the appendix to be supplemented.

3. *Timing; Deferred Appendix*
(*See* Fed. R. App. P. 30; D.C. Cir. Rule 30.)

Federal Rule of Appellate Procedure 30 authorizes either of two timetables for preparing the appendix. Under one method, the appendix is complete and available to the parties as they prepare their briefs. In the absence of informal cooperation, the appellant or the petitioner serves the appellee or the respondent with a designation of the proposed contents of the appendix, plus a statement of the issues which that party intends to present for review. The appellee or the respondent then has ten days to respond with a cross-designation. The appellant or the petitioner thereafter files and serves the appendix at the time of filing the brief.

The appellant or the petitioner may file a motion to use an alternate method that allows preparation of the appendix *after* the briefs are filed. Absent informal cooperation, each party serves its designation of the proposed contents of the appendix at the time of filing that party's main brief. The appendix then must be filed within two business days after the reply brief is due. *See* D.C. Cir. Rule 30(c). The Court routinely grants requests to file a "deferred appendix" unless the appellee or the respondent objects.

When parties write their briefs before the appendix has been prepared, they must nonetheless clearly cite to the record. In doing so, they may use the original pagination of the record (*e.g.*, "Tr. 1154"), in which case the original page numbers also must be indicated on the material reproduced in the appendix. An alternative and preferred procedure is to serve seven copies of the briefs in an unfinished form, either as typewritten or page-proof copy, containing references to the original record. Within 14 days after the appendix is filed, the parties must serve and file their briefs in final form, containing references to the appendix. *See* D.C. Cir. Rule 30(c). No changes other than citations to the deferred appendix and correction of typographical errors may be made in the final briefs filed under this method.

4. ***Format***
(*See* D.C. Cir. Rule 30(a).)

Unlike the brief, the appendix may be duplicated on both sides of each page. If the appendix is separately produced, it should have a white cover.

5. ***Number of Copies***
(*See* D.C. Cir. Rule 30(a).)

The appellant or the petitioner must file ten copies of the appendix with the Clerk, and serve one copy on counsel for each party separately represented; only four copies of exhibits separately reproduced need be filed.

6. ***In Forma Pauperis Appeals***
(*See* D.C. Cir. Rule 24.)

An appellant proceeding *in forma pauperis* is not required to file an appendix. Instead, the appellant must furnish, with his or her brief, one copy of the transcript pages the appellant wishes to call to the Court's attention; one copy of a list setting forth the page numbers of

the transcript so furnished; and one copy of other portions of the record to which the appellant directs the Court's attention. However, appellants are encouraged to submit four copies of these materials if they can. An appellee should furnish, with the brief, four copies of any pages of transcript or other portions of the record to which the appellee directs the Court's attention.

7. *Appendix Containing Matters Under Seal*
(*See* D.C. Cir. Rule 47.1(e).)

If it is necessary to include material under seal in an appendix, the appendix must be filed in two segments. One segment must contain all sealed material and must bear the legend "Under Seal" on the cover, and each page of that segment containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix -- Material Under Seal in Separate Appendix" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed segment and seven copies of the public segment of the appendix must be filed with the Clerk, and one copy of the public segment of the appendix and one copy of the sealed segment served on each party, if such party is entitled to receive the material under seal. Segments of appendices filed with the Court under seal are available only to authorized Court personnel and are not made available to the public.

X. THE COURT'S CALENDAR

The Court currently hears cases in eight sitting periods consisting of four weeks each. Except when it is sitting *en banc*, the Court hears cases in panels of three judges. Except in early September, ordinarily only one panel sits at a time and that panel stays together for an entire week, from Friday to the following Thursday. The panel is usually in recess on Wednesday. Judges are usually assigned to no more than one regular merits panel during a sitting period.

A. SCHEDULING SITTING PERIODS

The sitting periods ordinarily begin in September and end in May or June. While there are usually no formal sitting periods in July and August, panels of the Court are available throughout the summer to hear appeals in which there is an urgent need for immediate consideration. These summer panels also continue to decide motions and cases submitted without argument pursuant to Circuit Rule 34(j).

The sitting periods for each term are scheduled the preceding winter. The Clerk, with the assistance of a computer program, prepares a proposed schedule and submits it to the Court in executive session. The Court accepts the schedule as prepared by the Clerk or modifies it, if necessary.

B. MERITS PANELS

The Clerk assigns the judges in panels of three to the sitting weeks for which they are available for an entire term. The Clerk attempts to pair each active judge with each other active judge an equal number of weeks during the year, insofar as availability permits. If a judge becomes unavailable, he or she may arrange to switch sitting dates with another judge. Depending on their availability, senior judges of this Court and visiting judges from other courts also serve on panels. This assistance has been especially valuable in terms when one or more of the active judgeships have been unfilled.

C. CASELOAD AND CASE MIX

A panel generally hears cases on four days during its sitting period: Friday, Monday, Tuesday, and Thursday. Four cases are scheduled on Friday and Monday, and three on Tuesday and Thursday, for a total of 14 cases. The "mix" of cases (criminal appeals, private civil appeals, civil appeals where the federal government is a party, and administrative agency cases) in a given

sitting period reflects roughly the proportions of the Court's overall caseload.

D. SCHEDULING CASES FOR ARGUMENT

Most appeals screened by the Legal Division are classified as "regular merits" cases. The Clerk's Office sets an oral argument date and a briefing schedule in these cases as soon as all pending motions have been resolved. Depending on the availability of open dates on the Court's calendar and the amount of time needed for briefing, the case may be set well in advance of the hearing. Scheduling is done by a computer. Once a case has been screened, it is entered into the case calendaring program, which selects an oral argument date. The program automatically checks for known recusals, calculates the time necessary to brief the appeal, and makes certain that the case mix both for a specific date and for that week's sitting is acceptable. Cases, once they become ready, are calendared in order of age, with the oldest cases set first.

From time to time a judge must recuse himself or herself from consideration of a particular case. *See* 28 U.S.C. § 455; Canon 3E, Code of Judicial Conduct, Judicial Conference of the United States. The judge is not required to state the reasons for recusal. The provisional certificate of parties filed with the docketing statement, pursuant to Circuit Rules 12(c) and 15(c), affords the Clerk's Office the opportunity to determine in advance of briefing those judges who would be recused. In most cases, this ensures that the case will not be set for hearing on a day when the recused judge is sitting. In some cases, however, a judge may discover the basis for recusal only after the case has been scheduled before a particular panel. In those cases, a replacement judge is assigned to hear the case on that date.

Cases that have been designated as "Complex" by the Legal Division proceed on their own schedule for briefing and argument.

The merits panel is assigned soon after docketing, and that panel has complete discretion to determine the briefing schedule and the date on which to schedule argument. The panel works with the Legal Division to coordinate briefing and argument with counsel in the case.

E. SCHEDULING IN PARTICULAR CASES

1. *Special Panel*

From time to time in deciding motions, the special panel may have considered in great detail a matter that is closely related to the merits of a case; this consideration may have included oral argument. If that panel, on account of the time it has invested, determines that judicial efficiency would be served by the panel retaining the case on the merits, it will so advise the Clerk. The special panel controls the case from that point on to disposition.

2. *Related Cases*

Most related cases are consolidated before they are calendared, as described *supra* in Parts III.H and V.A. Occasionally, however, a case is identified after a related case has been scheduled for argument or even argued. In these and other instances in which the cases would normally have been consolidated, or at least joined for hearing before the same panel, the Clerk's Office advises the panel to which the earlier case has been assigned. If the panel determines, in the interest of judicial economy and consistency of decisions, to take the new case, it will so advise the Clerk.

3. *Cases on Remand to this Court*

When the Supreme Court remands a case to this Court for further proceedings, the case is assigned to the same panel that previously considered it.

4. *Stipulated Stand-by Pool*

Parties may agree to expedite their own cases by entering the Court's stipulated stand-by pool. Entering the pool allows the case to be used as a replacement for cases that are removed from the calendar too close to the argument date to be replaced in the normal course. Utilization of the stand-by pool usually results in significant expedition.

In order to enter the stand-by pool, parties must: (1) stipulate that they do not object to inclusion in the stand-by pool; (2) stipulate that they will not file any dispositive motions; and (3) agree to an expedited briefing schedule. In addition, counsel will be given at least 30 days notice of the argument date and that date will be no earlier than 30 days after the last brief is due. If counsel is unavailable for the selected date, every effort will be made to calendar the case so that consideration is not delayed. Parties should note that the Court will not ordinarily include in the stand-by pool cases that are inappropriate for oral argument, *see* Rule 34(j), or cases that require special internal management pursuant to this Court's Civil Appeals Management Plan.

XI. ORAL ARGUMENT

A. NOTIFICATION

(*See* Fed. R. App. P. 34(b); D.C. Cir. Rule 34(c).)

In civil cases, the Clerk's Office gives counsel notice of the date for oral argument when the briefing schedule is set. In criminal cases, the Clerk's Office ordinarily gives counsel notice of the date for oral argument after the briefs have been filed. Generally, the members of the panel of judges are named in the notice setting the date for oral argument; occasionally the panel is revealed in a later notice. The notice includes a form that counsel must complete and return to the Clerk's Office, no less than five days before oral argument, giving the name of the attorney or attorneys who will present the argument to

the Court. This form may be faxed to the Clerk's Office pursuant to the instructions on the form.

B. POSTPONEMENTS

(*See* Fed. R. App. P. 34(b); D.C. Cir. Rule 34(g).)

The Court disfavors motions to postpone oral argument, and will grant them only upon a showing of "extraordinary cause." Unless the panel that grants a motion to postpone argument is prepared to retain the case and hear it outside its normal sitting period, the case will have to be rescheduled for the first available open date on the calendar - possibly months later than the original date. Accordingly, it is in counsel's interest to avoid seeking to postpone argument.

C. ARGUMENT TIME

(*See* D.C. Cir. Rule 34(b).)

1. *Screening by the Panel*

When cases are assigned to panels, the Clerk designates one active judge of the Court on the panel for each day to have primary responsibility for screening cases for that day. The screening function is concerned with alignment of parties and issues, and allotment of times for the arguments. Senior judges of this Court and visiting judges from other courts do not serve as screening judges. The name of the screening judge is not made public.

As soon as briefs are received, the Clerk's Office may distribute the briefs, appendices, and other relevant materials to the judges. One set of briefs is mailed to visiting judges, with a second set reserved at the Court for their use upon arrival. In addition, the panel has before it any motions for special allotment of argument time. The screening judge reviews the assigned cases and then sends a memorandum to the other judges on the panel containing his or her screening decisions.

There is no standard length of oral argument time, although the allotment of 15 or 20 minutes per side is perhaps the most common. The screening judge evaluates each case, and may allot ten minutes per side or more.

In addition to specifying the length of argument time, the screening judge also may set a particular format for oral argument. The Court may limit the argument to certain issues; it may advise counsel that the panel wishes additional questions to be addressed at oral argument; and it may alter the usual order of presentation contemplated by Federal Rule of Appellate Procedure 34(c). The screening judge also advises the Clerk of the order in which cases set for a particular day will be heard.

When the screening judge allots time for argument, that decision is automatically effective, and no concurrences are necessary from the other members of the panel. If the screening judge recommends instead that the case be submitted without oral argument, pursuant to Circuit Rule 34(j), it is necessary that the other two members of the panel concur in this recommendation. After receiving the judges' screening memoranda, the Clerk's Office issues orders that reflect the screening decisions.

Parties allotted less time than they believe is warranted may move promptly for a grant of additional time. The Court rarely grants such motions. If the Court orders a case to be submitted without argument pursuant to Circuit Rule 34(j), counsel has ten days from the date of the screening order within which to move to restore the case to the argument calendar. The Court rarely grants these motions. On the other hand, a party in a case that has been set for argument may wish to move to submit the case on the briefs alone. Counsel should file such a motion as soon as possible after receiving the argument date and briefing schedule.

If a case is screened and then postponed before oral argument, the screening decision will be subject to redetermination when the argument is rescheduled.

2. *Rule 34(j) Dispositions*

Pursuant to Federal Rule of Appellate Procedure 34(a), the Court has adopted Circuit Rule 34(j) that describes certain circumstances in which cases will be submitted without oral argument. Among the factors the Court considers are: (1) whether the appeal is frivolous; (2) whether the dispositive issue has previously been authoritatively decided; and (3) whether the facts and legal arguments are adequately presented in the briefs and record so that oral argument would not significantly aid the Court. The decision to dispense with oral argument must be unanimously made by a three-judge panel.

The Court's Case Management Plan is designed to identify early in the appellate process cases suitable for disposition without oral argument under Rule 34(j). When a staff attorney screens a new appeal and concludes that Rule 34(j) treatment may be appropriate, that screening recommendation goes to the Clerk's Office, and a briefing schedule (but no oral argument date) is set. The staff attorney then reviews the briefs, and if he or she concludes that the case should be disposed of without oral argument, the staff attorney recommends to the special panel that it decide the case on the merits, pursuant to the Rule. The staff attorney also proposes a disposition, embodied in a draft judgment and accompanying memorandum. If the special panel accepts the recommendation for Rule 34(j) disposition, the panel issues an order advising the parties that the case will be decided without oral argument. Counsel may move within ten days for reconsideration of that order. In the absence of a successful motion to reconsider, the special panel will decide the case on the merits, usually by an unpublished *per curiam* judgment and memorandum.

The second way in which a case may be submitted for decision without oral argument is if the screening judge, with the concurrence

of the other two members of the merits panel, determines that a case, originally set for argument as a "Regular Merits" case, should be removed from the calendar and handled pursuant to Rule 34(j). The Clerk's Office issues an order notifying counsel of that decision, and counsel has ten days to move for reconsideration. The Court rarely grants such motions.

The merits panel discusses cases submitted without oral argument at the conference following oral argument on the day on which the case was originally scheduled to be heard. The disposition is usually in the form of an unpublished *per curiam* judgment and accompanying memorandum.

D. NUMBER OF COUNSEL

(*See* D.C. Cir. Rule 34(c) and (d).)

There is generally a limit of two counsel per side who may argue in cases allotted more than 15 minutes per side. In cases allotted 15 minutes or less per side, only one counsel may argue. This rule applies to consolidated cases, and it may be waived only by special leave of the Court.

An intervenor may argue only to the extent that counsel whose side the intervenor supports is willing to share argument time. If counsel wishes to share time with an intervenor in a case in which two counsel may argue, no special leave of the Court is necessary. Counsel should inform the Clerk's Office of this no less than five days before the date of argument, and the intervenor is counted as one of the two counsel per side permitted under the rules.

Counsel on the same side should make their own apportionment of time among themselves; otherwise the Court will do so. The attorney making the opening presentation should announce the arrangement to the Court; the courtroom deputy should be advised of the arrangement before the case is called. Each attorney is

thereafter limited to the time specifically allotted, unless the Court permits otherwise.

E. ARGUMENTS BY AMICI CURIAE
(*See* D.C. Cir. Rule 34(e).)

An *amicus curiae*, other than one appointed by the Court, may not present oral argument without permission of the Court, and such permission is sparingly granted. If counsel for the party supported by the *amicus* consents to share oral argument time with the *amicus*, no motion is necessary, subject to the limitation in Circuit Rule 34(c) that no more than two attorneys may argue. Otherwise, an *amicus* seeking leave to argue must file a motion no later than 14 days prior to the date oral argument is scheduled.

F. FORM AND CONTENT OF ARGUMENT
(See Fed. R. App. P. 34; D.C. Cir. Rule 34.)

The appellant is entitled to open and conclude the argument. If the case involves a cross-appeal, the first party to file a notice of appeal is deemed the appellant, unless the parties agree or the Court orders otherwise. In cases in which separate time is allotted to a number of parties, the screening order will indicate the order of presentation of argument to be followed by those parties.

The opening argument should include a brief introductory statement of the case and the issues presented. Counsel should not read from a prepared text, nor should counsel read at length from briefs, records, or authorities. *See* D.C. Cir. Rule 34(a). Counsel should be prepared to answer questions from the bench, and attorneys on the same side should take care not to duplicate their arguments.

If counsel wish to use any exhibits in the courtroom, counsel must make arrangements with the Clerk's Office and advise the Court and all other counsel by letter at least five days prior to the argument. The letter must set forth the justification for the use of the exhibits. After

the argument, counsel should remove the exhibits, unless directed otherwise by the panel. *See* D.C. Cir. Rule 34(i).

In this Circuit, the judges will always have read the briefs prior to the hearing. Counsel should keep this in mind when preparing and presenting argument.

Argument for the day usually begins at 9:30 a.m. and ends about 12:30 p.m. As a general rule, the panel will hear all cases scheduled for that day, even if it is necessary to recess for lunch and reconvene.

G. WEATHER CLOSINGS

As noted in Part II.B.4, if there is any possibility that because of inclement weather the Court may not be in session, counsel should call the Clerk's Office at (202) 472-9746 to confirm that the Court is open. In the absence of official notice *from the Court* to the contrary, counsel should assume that the Court *will* be in session. A general announcement by the media that the "government" is closed does not necessarily include the Judicial Branch.

H. PROCEDURES FOR ORAL ARGUMENT

Counsel should arrive at the courtroom at least 20 minutes before the start of argument for the day. The identity of the panel and the order in which the cases will be heard will be posted outside the courtroom. Counsel also may call the Clerk's Office in the afternoon of the day before argument to find out the order in which the cases will be heard. If more than one panel is sitting that morning, the notice also will disclose the other hearing location. The presiding judge may alter the order in which the cases are to be heard from the schedule posted. Counsel should sign in with the courtroom deputy upon arrival. Except as stated below, counsel must remain in the courtroom, or arrange with the courtroom deputy to be on call in the attorney's waiting room next to the courtroom. However, counsel scheduled to appear in the third and subsequent cases on the calendar

may be excused by the courtroom deputy after signing in, unless the panel otherwise directs. Prior to leaving the courtroom, excused counsel must inform the courtroom deputy of the places and, if available, telephone numbers, where they can be reached in the interim.

All counsel who have not remained in the courtroom must return to the courtroom 15 minutes before their cases are due to be heard, based on the time set for each preceding case.

The deputy will explain the warning light system used to signal the time remaining during the oral argument. Counsel for the appellant or petitioner also should inform the courtroom deputy whether he or she wishes to reserve time for rebuttal.

The presiding judge of the panel is the member of the panel in active service who is first in seniority. Visiting judges do not preside. The presiding judge sits in the center of the bench, and the next ranking judge is seated to his or her right. The names and seating arrangement of the panel for the day are marked on the lectern.

Facing the bench, counsel for the appellant or the petitioner sits at the table to the right of the lectern, and counsel for the appellee or respondent to the left. Additional counsel may sit at the tables or elsewhere in the well of the courtroom.

Three lights -- green, amber and red -- are on the lectern in front of counsel. The lights also are visible to the court on the rear of the lectern. If counsel does not wish to reserve rebuttal time, the courtroom deputy will flash the amber light when there are two minutes remaining in the allotted time. The red light will be turned on when all the allotted time is used. If counsel wishes to reserve time for rebuttal, that counsel must observe the timer and preserve the time he or she has reserved for rebuttal. During rebuttal, counsel will receive no amber light warning when time is about to expire; when the time has expired, the red light will be turned on.

When the questioning has been extensive, the presiding judge in his or her discretion may grant counsel additional time for argument. The Court also may terminate the hearing before the allotted time is up, if further argument appears unnecessary.

I. TRANSCRIPTION OF ARGUMENTS

All arguments are tape-recorded for future reference of the Court. Tapes are retained at the Court for a period of five years. If counsel wishes to listen to the recording of an oral argument or to have the recording transcribed, counsel should make the request in a letter to the Clerk. Counsel should provide in the letter the name of the case, the case number, and the date of the argument. Counsel also must make appropriate arrangements with the company that is the Court's official reporter. The Clerk will release the tape to the company for preparation of the transcript. In addition, copies of oral argument tapes may be purchased upon written request after the case has been completely closed. This means all appeals, remands, or additional proceedings must be concluded before the tape will be reproduced.

XII. MAKING THE DECISION

A. FORMS OF DECISION

(*See* Fed. R. App. P. 36; D.C. Cir. Rule 36.)

Four possible forms for disposing of cases that have been considered by a merits panel are currently used: a published signed opinion; a published *per curiam* opinion; an unpublished judgment or order with memorandum; and a simple judgment or order without memorandum. The first two forms are familiar to all attorneys. An unpublished judgment or order with memorandum is addressed primarily to those immediately concerned with the case and is not duplicated for subscribers. The memorandum usually is fairly brief, stating only the facts and law necessary for an understanding of the Court's decision. A simple judgment or order indicates affirmance or reversal, or grant or denial of a petition for review, with a brief

explanation, such as citation of a governing precedent or adoption of the reasoning of the district court or agency.

Circuit Rule 36(a)(2) sets out the criteria the Court employs in determining whether to publish an opinion. The Court's policy is to publish an opinion or memorandum, meeting one or more of the following criteria: (1) the opinion resolves a substantial issue of first impression generally or an issue presented for the first time in this Court; (2) the opinion alters, modifies, or significantly clarifies a rule of law previously announced by the Court; (3) the opinion calls attention to an existing rule of law that appears to have been generally overlooked; (4) the opinion criticizes or questions existing law; (5) the opinion resolves a conflict in decisions within the Circuit or creates a conflict with another circuit; (6) the opinion reverses a published district court or agency decision, or affirms it on grounds different from those in a published opinion of the district court; or (7) the opinion warrants publication in light of other factors that give it general public interest.

While an unpublished decision may not be cited as precedent in this Circuit, it may, of course, be invoked for its preclusive effects. *See* D.C. Cir. Rule 28(c).

B. CASE CONFERENCES

In this Circuit, cases decided on the merits are generally discussed at a case conference. If the case was argued, the conference generally takes place later the same day; if the case was submitted without argument, it is usually discussed at the same conference as the cases with which it was originally scheduled. This Court does not ordinarily decide argued cases from the bench.

At the conference, the members of the panel reach agreement on the form as well as the substance of the decision. If the panel decides to issue an opinion or memorandum, the presiding judge assigns the

responsibility for writing it, unless he or she is in the minority, in which event the senior member of the panel in the majority designates the author. When a case has been submitted without oral argument, the screening judge usually prepares the opinion or memorandum.

C. PREPARATION OF OPINIONS

If the case is to be decided with an opinion or memorandum, the author circulates a draft to the other members of the panel. The other judges are free to suggest changes in the proposed text, or they may draft and circulate concurring or dissenting opinions. These may lead to further changes in the majority opinion.

Final drafts of all opinions to be published also are circulated to all active judges on the Court. Following circulation of the drafts to the panel and the Court, the Clerk's Office forwards the opinion to the printer for publication.

D. TIMING OF DECISIONS

At each monthly meeting of the judges, there is a report on the status of every case that has been argued but not yet assigned, and each judge reports on the status of every opinion assigned to him or her that either has not been circulated or is awaiting clearance by other members of the panel.

Occasionally a panel deliberately defers decision of a case, pending disposition of another case in this Court or before another tribunal. The Clerk's Office usually notifies the parties by an order holding the case in abeyance pending a decision or some other event.

E. NOTICE OF DECISIONS

When a case is decided by an opinion, the Clerk notifies counsel for each party by telephone on the day the opinion issues, and also sends them copies of the opinion by mail. In cases decided without an

opinion, the Clerk mails counsel a copy of the judgment and accompanying memorandum.

Printed slip opinions are available in the public office of the Clerk's Office. There is a charge for single opinions. For an annual fee, it is also possible to become a subscriber to the opinions of the Court to receive all opinions published by the Court. Members of the bar should call the Clerk's attention to typographical or other errors in slip opinions.

Opinions, dockets and other court records also are available on an electronic Appellate Bulletin Board System (ABBS). *See supra* Part II.B.3. Electronic copies of the Court's published opinions will be retained on ABBS for at least 30 days after release. The download capability is in WordPerfect 5.1 format and in an unformatted ASCII/text version.

Opinions are added to ABBS soon after they are publicly released. Docket sheets provide case information for the previous day. An ABBS instruction sheet is available upon request.

Although certain decisions are not published, all judgments and memoranda that are filed with the Clerk are public records, accessible to the public upon application in accord with procedures of the Office of the Clerk.

XIII. POST-DECISION PROCEDURES

A. TERMINATING THE CASE

1. *Enforcement Judgments*
(*See* Fed. R. App. P. 19.)

After the Court enters an opinion granting enforcement in part of an agency order, the agency within 14 days must submit a proposed judgment to the Court. If the respondent disagrees with the agency's

proposal, the respondent has seven days thereafter to file an alternative judgment. The panel will then either settle the judgment and direct its entry, return the matter to the agency for redrafting, or craft its own judgment.

2. ***Mandates***
(*See* Fed. R. App. P. 41; D.C. Cir. Rule 41.)

The Court will enter its judgment in a case on the same date its decision is issued. Ordinarily, the Clerk will issue a certified copy of that judgment in lieu of a formal mandate seven days after the period for seeking rehearing has expired or a petition for rehearing has been decided. The Court, however, retains discretion to direct immediate issuance of its mandate in an appropriate case, and any party may move at any time for expedited issuance of the mandate on a showing of good cause. Counsel should not confuse the mandate with the judgment itself because the time for filing a petition for a writ of certiorari with the United States Supreme Court runs from the date of this Court's judgment or disposition of a timely petition for rehearing.

A motion for stay of the mandate must set forth facts showing good cause. Unless the motion recites that the other parties do not object to a stay, the motion will not be acted upon until the seven days allowed for a response have expired. Subject to these limitations, the Clerk has been given authority to grant unopposed motions for stays for a period of up to 30 days. In his or her discretion, the Clerk may instead submit the motion to the panel that decided the case. Motions to reconsider a decision by the Clerk also are referred to the merits panel. If a motion to stay issuance of the mandate is denied, the mandate ordinarily will be issued seven days thereafter. Stays ordinarily will not extend beyond 30 days from the date the mandate otherwise would have been issued.

A petition for a writ of *certiorari* filed during the term of a stay of mandate issued by this Court will continue the stay in effect. A

petition for a writ of *certiorari* filed under any other circumstances has no effect on the mandate.

3. *Remands*
(*See* D.C. Cir. Rule 41(b).)

When the Court remands the *record* in any case to the district court or to an agency, the Court retains jurisdiction over the case. When the Court remands the *case*, the Court does not retain jurisdiction, and a new notice of appeal or petition for review is required if a party seeks review of the proceedings conducted on remand.

4. *Costs*
(*See* Fed. R. App. P. 39; D.C. Cir. Rule 39.)

Costs, when requested, are usually charged to the losing party or to an appellant who withdraws the appeal. When the government is a party to a suit, costs are governed by statute. Costs are not taxed for briefs of *amici curiae* or intervenors or separate replies thereto except on motion granted by the Court.

The items allowed as costs are set forth in Circuit Rule 39(a). Reimbursable printing costs are limited to the cost of the most economical means of reproduction. In addition to the docketing fee, costs are allowed for the number of copies of briefs and appendices that must be filed in the Court and served on parties, intervenors and *amici curiae*, plus three for the submitting party.

Counsel has 14 days after entry of judgment to submit the bill of costs with service on opposing counsel. Printing costs must be itemized and verified to show the charge per page. Opposing counsel may file objections. The Clerk's Office provides forms for itemizing bills of costs, and bills that are not presented on these forms (or reasonable facsimiles thereof) will not be accepted for filing.

The Clerk reviews the bill for compliance with the rules and then prepares a statement for inclusion in the mandate. Ordinarily, the directions as to costs are issued at the same time as the mandate. If the matter of costs has not been settled by that time, the Clerk will at a later date send a supplemental statement to the district court or agency for insertion in the mandate.

Once a party is ordered to pay costs, there is usually no further action on the matter in this Court. Any action to enforce an award of costs is brought in the district court. In addition, various expenses incidental to the appeal must be settled in the district court. Among these are the costs of the reporter's transcript, the filing fee for the notice of appeal, the Clerk's fee for preparing and transmitting the record, and the premiums paid for any required appeal bond. The successful party on appeal must apply for recovery of these expenses in the district court after issuance of the mandate of this Court.

B. RECONSIDERATION

1. *Rehearing by the Panel*

(*See* Fed. R. App. P. 35, 40; D.C. Cir. Rule 35.)

Very few petitions for rehearing are granted. Costs of up to $250 may be awarded as a penalty for filing a petition for rehearing found to be wholly without merit.

If a party seeks rehearing, it must file a petition for rehearing within 30 days after entry of the judgment if the United States or an agency or officer thereof is not a party to the case, and within 45 days if the United States or an agency or officer thereof is a party. These time limits will not be extended except for good cause shown. The petition must state with particularity the errors that the panel is claimed to have made. Counsel must file an original and four copies. A copy of the panel's opinion must be attached as an addendum to the petition. The form of a petition for rehearing is governed by Circuit

Rule 27, except that the petition cannot exceed 15 pages. Motions to exceed this page limitation are viewed with disfavor and will be granted only for extraordinarily compelling reasons. Accordingly, such motions are rarely granted.

A response to the petition is not permitted, unless the panel requests one. However, a petition for rehearing will not ordinarily be granted, nor will an opinion or judgment be modified in any significant respect, in the absence of a request by the Court for a response.

The Clerk does not send the mandate to the district court or agency until a timely petition for rehearing has been decided, unless the Court expressly so orders. The Clerk also will delay issuing the mandate when a party moves for an extension of the time within which to petition for rehearing.

A timely petition for rehearing extends the time for petitioning the United States Supreme Court for a writ of *certiorari*. A suggestion for rehearing *en banc* does not, under the Supreme Court's rules, stay the time for filing a petition for *certiorari*, nor, under Federal Rule of Appellate Procedure 41(a), stay the issuance of the mandate. However, under Circuit Rule 35(e), any pleading requesting rehearing *en banc* is deemed to include a petition for rehearing by the panel. Thus, such a timely pleading will stay the time for filing a petition for *certiorari* and for issuance of the mandate.

The Clerk sends the petition to the panel members with a vote sheet. When the votes are returned, the Clerk enters an appropriate order for the Court. If a suggestion for rehearing *en banc* also has been filed, the Clerk will withhold entry of an order denying rehearing by the panel until the *en banc* question has been resolved. If rehearing *en banc* is granted, the panel's judgment, but not its opinion, is vacated, but the panel may act on the petition for rehearing without waiting for final termination of the *en banc* proceeding. On termination of the *en banc* proceeding (including when the *en banc* Court divides evenly), a new judgment will be issued.

2. *Rehearing En Banc*

(*See* Fed. R. App. P. 35; D.C. Cir. Rule 35.)

Like petitions for rehearing by a panel, suggestions for rehearing *en banc* are frequently filed but rarely granted. Federal Rule of Appellate Procedure 35(a) expressly states that *en banc* hearings are not favored and ordinarily will not be ordered except to secure uniformity of decisions among the panels of the Court, or to decide questions of exceptional importance.

The formal requirements for a suggestion for rehearing *en banc* partly duplicate, and partly differ from, those for a petition for rehearing by the panel. The suggestion must be filed within 30 days after entry of the judgment if the United States or an agency or officer thereof is not a party, and within 45 days if the United States or an agency or officer thereof is a party. It must begin with a section entitled "Concise Statement of Issue and Its Importance" that sets forth why the case is of exceptional importance or cites the decisions with which the panel judgment is claimed to be in conflict. An original and 19 copies must be filed. As with rehearing petitions, a copy of the panel opinion must be attached as an addendum to the petition. The suggestion cannot be more than 15 pages in length. Motions to exceed this limitation are viewed with disfavor and will be granted only for extraordinarily compelling reasons. Accordingly, such motions are rarely granted.

If a party is submitting both a petition for rehearing by the panel and a suggestion for rehearing *en banc*, the two should be combined in the same document, in which event an original and 19 copies should be filed, and the page limits for the combined pleading is 15 pages. If the two pleadings are filed separately, they may not, combined, exceed these page limits.

As in the case of petitions for rehearing, the rules do not provide for a response to a suggestion for rehearing *en banc*, except by request of the Court. If any member of the Court wishes a response,

the Clerk will enter an order to that effect. There is no oral argument on the question of whether rehearing *en banc* should be granted.

The Clerk transmits the suggestion for rehearing *en banc* to all members of the original panel, including a senior judge of this Court, or a judge visiting from another court, and to all other active judges of this Court. The Clerk sends a vote sheet and, for non-panel members, copies of any non-published decisions issued by the original panel. A vote may be requested by an active judge of the Court, or by any member of the panel. If no judge asks for a vote within a specified time, and none requests more time to consider the matter, the Clerk will enter an order denying the suggestion.

If a judge calls for a vote on the suggestion for rehearing *en banc*, the Clerk immediately sends to the full Court a new vote sheet. The question now is whether there should be a rehearing *en banc*. On this question only active judges of the Court may vote, and a majority of all active judges, regardless of recusals or temporary absences, must approve rehearing *en banc* in order for it to be granted.

When rehearing *en banc* is granted, the Clerk enters an order granting the rehearing *en banc* and vacating the judgment by the original panel, either in whole or in part, as circumstances warrant. This order is circulated to all who subscribe to the Court's opinions and is published in the federal reporter system. An order granting rehearing *en banc* does not indicate the names of the judges who voted against rehearing, but an order denying rehearing *en banc* does indicate the names of the judges who voted to grant rehearing *en banc*, if they wish.

The Court has followed a variety of procedures in conducting rehearing *en banc*. On occasion, only the original briefs have been considered; in other cases, the Court has requested supplemental briefs. The Court almost always hears oral argument in considering a case *en banc*.

The Court sitting *en banc* consists of all active judges, plus any senior judges of the Court who were members of the original panel, and who wish to participate, but not visiting judges from other courts. When the Court sits *en banc* with an even number of judges, and the result is an evenly divided vote, the Court will enter a judgment affirming the order or judgment under review, regardless of the panel decision, and it may publish the *en banc* Court's divided views.

In the absence of a request from a party, any active judge of the Court, or member of the panel, may suggest that a case be reheard *en banc*. If a majority of the active judges agree, the Court orders rehearing *en banc*.

In addition, a party may move for *en banc* consideration prior to a panel decision. Such a suggestion should include a "Concise Statement of Issues and its Importance" and conform to the other requirements of Circuit Rule 35(c). If a party wishes a case to be heard initially *en banc*, counsel ideally should file the suggestion within the first 30 days after docketing, but in no event later than the date on which the appellee's or the respondent's brief is due. A judge also may suggest *en banc* consideration prior to the panel decision; on occasion this has been done by the panel itself.

C. REVIEW BY THE SUPREME COURT OF THE UNITED STATES

In general, a party has 90 days from the entry of judgment or the denial of a timely petition for rehearing, whichever is later, in which to petition for a writ of *certiorari*. A circuit court cannot enlarge this time period; application for an extension must be made to the Supreme Court. Counsel should be mindful that the judgment is entered on the day of the Court's decision and not when the mandate -- *i.e.*, a certified copy of the judgment -- is issued.

Because of a problem of space, the Clerk of the Supreme Court has requested that this Court not transmit any record, or portion of a record, unless specifically requested by the Clerk or Deputy Clerk.

When a party files a petition for a writ of *certiorari* before the mandate of this Court is issued, the mandate is stayed until the Supreme Court disposes of the case *only* if the party first obtained a stay of mandate and filed the petition within the period the stay was in effect. Counsel should notify the Court when the petition for a writ of *certiorari* has been filed. Federal Rule of Appellate Procedure 41(b) provides that the stay pending application for *certiorari* "shall not exceed 30 days unless the period is extended for cause shown." As noted, if counsel files a petition for a writ of *certiorari* within the term of the stay, the stay continues until the case is disposed of by the Supreme Court. Upon notification of denial of the petition by the Supreme Court, this Court's mandate will be issued promptly.